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# Eighth report on unilateral acts of States

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## Introduction

1. In his 2004 report[1] the Special Rapporteur presented a number of examples to show the practice of States with regard to unilateral acts. Not all of them, as stated in the report, were unilateral acts in the strict sense of the term, but references to and consideration of them remained highly relevant nonetheless. The International Law Commission considered the report, expressed a favourable opinion of the progress made on the topic, and created, in order to proceed with work on the topic, a Working Group chaired by Mr. Alain Pellet, which considered the proposals of the Special Rapporteur.[2] In the course of four sessions, the Working Group considered some of the cases presented by the Special Rapporteur and agreed that some of them would be analysed in accordance with the specific framework to be adopted on that occasion, and to which reference is made below.

2. Some members of the Working Group provided assistance to the Special Rapporteur by sending information on specific cases. The contributions of Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Kolodkin, Mr. Matheson, Mr. Opertti Badan and Mr. Pellet are highly appreciated; they made very interesting and useful contributions which formed the basis of the research conducted this year.

3. The topic of unilateral acts was broached in the Sixth Committee at the fifty-ninth session. During that debate, various delegations reaffirmed their view of unilateral acts as a source of international obligations.[3] It was emphasized that in the following stage a definition of unilateral acts should be developed based on the operative text adopted by the Working Group in 2003. Furthermore, an effort should be made to formulate a number of general rules applicable to all unilateral acts and declarations considered by the Special Rapporteur in the light of State practice, with a view to promoting the stability and predictability of their mutual relations.[4] The Commission should offer a clear definition of unilateral acts of States capable of producing legal effects, with sufficient flexibility to leave States a timely margin for manoeuvre in order to be able to carry out their political acts.[5] The delegations noted that it would be useful to proceed with a study of the evolution of different acts and declarations,[6] especially as regards their author, their form, the subjective elements they contain, their revocability and validity, and the reactions of third States.[7] The importance accorded to State practice was a step towards enabling progress to be made in the study of the topic.[8]

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[1] A/CN.4/542.

[2] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), pp. 260-261.

[3] See GA/L/3267 and GA/L/3268.

[4] See, inter alia, the views of the representative of Chile (GA/L/3266), Guatemala (GA/L/3267), Australia (GA/L/3268) and Romania (ibid.)

[5] See, in that connection, the views of the representative of Germany (GA/L/3267), China (ibid.), Canada (ibid.), Malaysia (GA/L/3268), Australia (ibid.) and Sierra Leone (ibid.).

[6] "The lifespan of unilateral acts", as highlighted, for example, by Mr. D. Momtaz during the debates at the previous session of the Commission in July 2004.

[7] See, inter alia, the views of the representative of China (GA/L/3267), Canada (ibid.), Portugal (ibid.), Italy (ibid.), Japan (GA/L/3268) and Malaysia (ibid.).

[8] See, inter alia, the views of Portugal (GA/L/3267), Spain (ibid.), Italy (ibid.) and Australia (GA/L/3268).

4. Certain delegations stressed in the discussions that a study and supplementary analysis of State practice in that area should be carried out for the purpose of establishing a classification of unilateral acts and their legal effects and distinguishing clearly among the different categories of such acts.[9]

5. Many delegations supported the Commission's decision to create an open-ended working group to study a number of cases. With regard to whether or not so-called political acts should be included, the lack of a clear boundary between legal and political acts was mentioned. Some political acts could actually produce legal effects. One classification proposed, for example, was the distinction between acts which contribute to the development of customary norms of international law, acts which create specific legal obligations, and acts which produce other effects under international law. The view was expressed that a classification of this type might help the Special Rapporteur to distinguish unilateral acts relevant to the Commission's study and thus determine the main items for reflection. It was also stressed that one of the greatest obstacles to the classification effort was the fact that an act could belong to several of the categories mentioned in the seventh report at the same time and that, accordingly, the classification was not ideal.[10]

6. Another point raised during the discussion relates to the competence of persons authorized to formulate unilateral acts on behalf of the State, and the doubts that have arisen with regard to the nature and form of such acts; it is not clear, for example, whether the declarations of a State, its conduct or even national law constitute unilateral acts in the sense with which the Commission is concerned. In order to define clearly the legal nature of such acts, the Commission should take into account not only the objective elements of such unilateral acts, but also their subjective elements, such as the intention of the States in question, an aspect which is difficult to grasp.[11] The criteria of validity of unilateral acts was also mentioned as an issue that should be taken into account in the analysis of these acts.[12]

7. Other delegations believed that the preparation of draft articles on the topic was premature at the current stage of the work. There was a need for an in-depth and more detailed investigation. The necessary differentiation between unilateral acts of a legal character and unilateral acts which do not produce legal effects is undoubtedly one of the more complex aspects of the topic.

8. It is interesting to note that the positions outlined in the Sixth Committee to some extent reflect the positions already outlined in the Commission itself. One conclusion should be emphasized: regardless of the doubts, or of scepticism with regard to the possibility of final codification of the topic, the common view underlying the debates at the most recent session was that a deeper and more detailed investigation was necessary, especially with regard to the practice of States. This approach could serve as a guideline for future work, which, in accordance with the outline contained in the seventh report, would focus on the study of State practice.

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[9] See, inter alia, the views of Germany (GA/L/3267), Canada (ibid.), Guatemala (ibid.) and Malaysia (GA/L/3268).

[10] See, inter alia, the views of Germany (GA/L/3267), Canada (ibid.), Guatemala (ibid.) and Malaysia (GA/L/3268).

[11] See, inter alia, the views of Australia (GA/L/3268), Japan (ibid.) and Malaysia (ibid.).

[12] See, for example, Malaysia's view (GA/L/3268).

9. On the basis of the suggestions made by the Commission and by States in the Sixth Committee, this report presents the consideration of certain acts which have been considered relevant for a more detailed study of practice relating to these acts (section II) and the conclusions which, in the view of the Special Rapporteur, can be drawn from this practice. These conclusions can facilitate the establishment of common elements and, accordingly, future efforts to define a set of guidelines relating to the functioning of these legal acts (section III).

10. It should also be noted that the report considers only unilateral legal acts in the strict sense of the term, in accordance with the discussions in the Commission and some types of conduct which, without being acts of that nature, can produce similar effects. In that regard we should recall, merely as a basic reference, that the International Court of Justice has in various cases considered certain types of unilateral State conduct which produce or may produce legal effects.[13]

11. In accordance with the discussions held last year in the Commission and the Working Group established at that time, it was agreed to consider in detail the following acts: note dated 22 November 1952 from the Minister for Foreign Affairs of Colombia; statement by the Minister for Foreign Affairs of Cuba relating to the supply of vaccines to the Eastern Republic of Uruguay; waiver by Jordan of claims to the territories of the West Bank; statement by Egypt of 24 April 1957; statements by the Government of France concerning the suspension of nuclear tests in the South Pacific; protests by the Russian Federation addressed to Turkmenistan and Azerbaijan; statements made by the nuclear-weapon States; Ihlen Declaration of 22 July 1919; Truman Proclamation of 28 September 1945. The statements or acts of the Swiss Government authorities addressed to an international organization were also considered, i.e., statements relating to the United Nations and its staff (tax exemptions and privileges). Lastly, the various types of conduct of two States in the context of a case before the International Court of Justice were considered, i.e., the positions of Cambodia and Thailand in the *Temple of Preah Vihear* case.

12. As indicated earlier, these statements were considered on the basis of the general guidelines agreed last year in the Working Group, which, as will be recalled, proposed that the consideration of such acts or statements should include the following: date; competence of the author or organ; form; content; context and circumstances; objectives sought; addressees; reactions of the addressees; reactions of third parties; basis; application; modification; termination/revocation; legal scope; decision of a judge or an arbiter; comments and bibliography.[14]

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[13] See the *Anglo-Norwegian Fisheries* case (*I.C.J. Reports 1951*, pp. 138 et seq.); *Case concerning the Arbitral Award Made by the King of Spain on 23 December 1906* (*I.C.J. Reports 1960*, pp. 192, 209 and 213); *Case concerning Right of Passage over Indian Territory* (*I.C.J. Reports 1960*, p. 39); *Case concerning the Temple of Preah Vihear* (*I.C.J. Reports 1962*, p. 21); *Tunisia/Libyan Arab Jamahiriya* case (*I.C.J. Reports 1982*, pp. 65-67); *Gulf of Maine* case (*I.C.J. Reports 1984*, pp. 303 et seq.); *Case concerning the Burkina Faso/Mali territorial dispute* (*I.C.J. Reports 1992*, p. 554 et seq.); and *Case concerning the land, island and maritime frontier dispute* (*I.C.J. Reports 1992*, pp. 408, 422 et seq. and 559 et seq.).

[14] See *Report of the International Law Commission, Fifty-sixth session* (3 May-4 June and 5 July-6 August 2004), A/59/10, pp. 260-261, where reference is made to the conclusions of the Working Group.

# I. Consideration of certain acts

## A. Note dated 22 November 1952 from the Minister for Foreign Affairs of Colombia

13. We will first consider note No. GM-542 of 22 November 1952 from the Minister for Foreign Affairs of Colombia, signed by the then Minister for Foreign Affairs of Colombia, Juan Uribe Hologuín, and sent to and received by the then Ambassador of Venezuela to Colombia, Luis G. Pietri, concerning Venezuela's sovereignty over the Los Monjes archipelago.

14. The Minister for Foreign Affairs — an official who, under international law (primarily the Vienna regime on the law of treaties), can act and commit the State which he represents in its international legal relations without needing full powers,[15] formulated the act. This, however, raises a question that will be referred to below, namely, the question of competence to formulate an act related to a matter which, under the Constitution of the country in question, lies within the exclusive competence of the President of the Republic and is subject to the approval of Congress. This is a question linked to the validity of the act from the point of view of the Colombian Constitution.

15. The unilateral act that we are considering was formulated through an official note from the Government of Colombia, signed, as stated above, by the Minister for Foreign Affairs and addressed to the Government of Venezuela through Venezuela's Ambassador in Bogotá.

16. The note reads as follows:

"Ambassador,

"In recent months, the Government of the United States of Venezuela and the Government of Colombia have expressed, in a cordial, friendly manner through their respective Ambassadors in Bogotá and Caracas, their points of view concerning the legal status of the group of islets known as 'Los Monjes'.

"My Government considers that the time has come to put an end to these discussions, which have established the following:

"1. In 1856, the Government of the United States of Venezuela notified the Government of New Granada, through the diplomatic channel, of its claim to the aforementioned archipelago. This claim originated with the contract concluded between the Government of New Granada and Mr. John E. Gowen on 20 February 1856 'concerning the exploration, colonization and exploitation of certain islands owned by the Republic of New Granada'; article 6 of this contract included the San Andrés, Providencia and Los Monjes groups among the islands, cays and islets referred to therein.

"2. This contract of 20 February 1856 was submitted by the executive branch of New Granada for approval by the legislature; the Senate ordered that

[15] Article 7, paragraph 2, of the 1986 Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations states that: "In virtue of their functions and without having to produce full powers, the following are considered as representing their State: (a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty ...".

it be published in the Official Gazette, and this was done in No. 1917 of 28 February 1856. On the day after the contract was published, Venezuelan diplomatic officials in Bogotá wrote to the Minister for Foreign Affairs of New Granada, requesting that the Los Monjes group of islets be excluded because they belonged to Venezuela rather than to my country. On 3 March 1856, the Secretary for Foreign Affairs of New Granada replied to those plenipotentiaries, stating that the contract published four days earlier contained typographical errors, including a reference in article 6 to 'Los Monjes' rather than 'Los Mangles'. The errors were noted in Official Gazette No. 1920, published on that same date (3 March 1856). While the Minister for Foreign Affairs of New Granada, Lino de Pombo, stated in his reply that he would not enter 'into the question of control and jurisdiction over the group of islands known as "Los Monjes", which by virtue of their location appear to be a natural annex of the Guajira Peninsula', he did not challenge Venezuela's acts asserting control and jurisdiction. In accordance with notes contained in the archives of the Colombian Congress, the Senate of New Granada then ordered the contract concluded with Mr. Gowen to be archived.

"3. On 22 August 1871, the Provisional President of the United States of Venezuela issued a decree establishing jurisdiction over a territory known as 'Colón', which was subject to a special regime under the authority of the federal executive branch; this territory included a number of islands, including the Los Monjes archipelago. Once again, Colombia did not object to this decree or to any of the jurisdictional claims repeatedly made by the Government of the United States of Venezuela to the aforementioned archipelago, which have been recorded in official Venezuelan publications.

"4. As representatives of the two Ministries of Foreign Affairs have recently stated, none of the treaties, agreements and declarations signed by Colombia and the United States of Venezuela mention this archipelago since, throughout the lengthy process by which the Governments sought to resolve their territorial disputes — now fortunately concluded — Colombia, despite the events mentioned above, refrained from presenting any claims or arguments to disprove the position of the United States of Venezuela concerning its jurisdiction and control over the Los Monjes archipelago.

"On the basis of this past history, the Government of Colombia hereby declares that it does not oppose the sovereignty of the United States of Venezuela over the Los Monjes archipelago, and that therefore it does not oppose nor does it wish to make any claim concerning the exercise of such sovereignty or any act by Venezuela asserting control over the archipelago in question.

"Colombia's consistent policy has been to recognize the plenitude of foreign law and always to act in accordance with the provisions of published treaties. Therefore, in making this solemn declaration, my Government is pursuing a course of conduct which is a source of legitimate pride to the Republic.

"I take this opportunity to convey to Your Excellency the renewed assurances of my highest consideration."[16]

17. The Government of Venezuela replied to this note on the same date through its Ambassador in Bogotá. The text of this note reads as follows:

"Minister,

"I have the honour to inform you of the receipt of your letter No. GM-542 of today's date, setting forth the conclusions that the Government of Colombia has reached with regard to the Los Monjes archipelago, as a result of the cordial talks which the Governments of our two countries have held on that subject in recent months through our embassies in Bogotá and Caracas.

"My Government fully agrees with the terms of your note and greatly appreciates the decision taken by the Government of Colombia to declare, as it has done, that it does not oppose our sovereignty over the archipelago in question, which has long been under my country's jurisdiction and to which my country has a number of well-founded titles establishing it as an integral part of Venezuelan territory. My Government also appreciates the spirit of brotherly friendship which always governed our talks on this subject.

"The Government of Colombia highly commends the attitude which you have taken in this matter. In so doing you have confirmed your adherence to the highest principles of American law and demonstrated in an exemplary fashion that your conduct, as an enlightened member of the community of our Republics, follows the best traditions of a continent which has established law and justice as the essential basis of international relations.

"I am certain that acts such as that of your Government will make a highly effective contribution to the growing friendship between our two countries and that the greatest benefits of cooperation and mutual understanding will flow therefrom."[17]

18. The note was drafted in the framework of bilateral negotiations concerning sovereignty over the Los Monjes archipelago, as is clear from the text, which states that it is the result of "the cordial talks which the Governments of our two countries have held on that subject in recent months through our embassies in Bogotá and Caracas".

19. The objective of the note is to recognize Venezuela's sovereignty over the Los Monjes archipelago.

20. The performance of the act in this case merits additional commentary in the light of the situation created by a petition to the Council of State of Colombia for nullification of the note.

21. The Colombian Government performed the act and gave notification of it to Venezuela, which acknowledged receipt of the note; in other words, it accepted the notification. Colombia in no way questioned the validity of its note. However, at the national level, in the framework of the Council of State, it was proposed to nullify it

[16] Text reproduced in A. Vázquez Carrizosa, *Las relaciones de Colombia y Venezuela. La historia atormentada de dos naciones* (Ed. Tercer Mondo, Bogotá, 1983), pp. 337-339.

[17] Text reproduced in A. Vázquez Carrizosa, op. cit., pp. 340-341.

through a process which will be described briefly in order to show the domestic reaction, both official and unofficial, regarding the validity of the note. The views of the Government and of specialists on the validity of the act, its nature and its legal effects may be inferred from the debate on the matter and will doubtless enrich our consideration of the topic.

22. Venezuela's acceptance of the note of 22 November 1952 and its reply to the Government of Colombia can be taken to be its reaction. There is no record of the reaction of any other State to this note.

23. The Government of Colombia did not make any subsequent declaration questioning the act; however, two petitions for nullification were presented to the Council of State in 1971 and 1992, with differing results.

24. In 1971 the Council of State was asked to nullify the note on the grounds that it was unconstitutional. Among the petitioner's arguments was that a border issue must be settled through an international treaty approved by Congress. In response to this petition, the Council of State declared on 30 March 1971 that it lacked the competence to decide on nullification of the 1952 note. It then stated that "judicial administrative review of acts connected with intergovernmental relations is inadmissible; an administrative judge is not competent to deal with international relations, which are governed by international law. The limits of administrative competence exactly parallel the limits of Colombian domestic law; international legal disputes can be argued only before international courts."[18]

25. On 2 April 1971 the petitioner appealed the decision by the Council of State denying the admissibility of the petition, on the grounds that the note "did not meet the criteria for international acts established in the Colombian Constitution". The petitioner also stated that the necessary intent of the States to create an international act was not present in this case. These two statements by the petitioner reflect two important issues. First, the Colombian Constitution, like the vast majority of constitutions, does not explicitly recognize unilateral acts as international acts; most constitutions simply refer to treaties as acts through which a State commits itself at the international level, particularly, in this case, with respect to boundaries. The second contention is that unilateral acts do not produce legal effects unless they express the intent of the two States; in other words, that international obligations can be entered into only through a conventional act.

26. The Council revoked the inadmissibility decision and later admitted the petition of 30 March 1971. It decided not to "rule on the merits of the claim." The Council then declared that the issue could be considered only by an international court; this reflects the Council's view that what was at issue was an international act of the State and not simply an administrative act. It did not prejudge the nature of the act, i.e., whether it was a conventional or a unilateral act, stating in this connection that "the question would have to be decided by an international court in the event of a dispute which cannot be resolved through direct settlement procedures" and that "it would be for an international court to rule on the validity or invalidity of the act, whether unilateral or bilateral, where it is claimed that a defect might have affected consent or expressed intent ...".

[18] Citation from the arguments of one of the Councillors of State, E. Gaviria Liévano, *Los Monjes en el diferendo con Colombia* (Bogotá, 2001), pp. 164-165.

27. The Council's decision is accompanied by an extremely interesting dissenting opinion by one of its members, expressing the view that the Council should have nullified the act for four reasons: (a) inconsistencies in the decision; (b) the unilateral nature of the communication of 22 November 1952; (c) the communication of 27 November 1957 and the political acts; and (d) the issue of merits.

28. It should be noted that the principal basis of the petitioner's argument is that the note violated articles 3, 4, 76, paras. 18, and 120, paras. 9 and 20, of the Colombian Constitution, which establishes the criteria for performing an act of this kind. Under the provisions of this Constitution, legislative approval is essential for the conclusion of boundary treaties.

29. The Constitutional Council disqualified itself in a decision taken on 23 January 1975, which was again appealed, on 4 and 20 February 1978. The Council rejected the appeal on 4 April 1979 in a decision which again recognized that it was faced with an international act and not simply an administrative one.

30. The situation had not yet been resolved definitively. In 1985 a new petition for nullification of the act on grounds of unconstitutionality was attempted. The petitioners stated that "the boundaries of the Republic of Colombia can be changed only through treaties or conventions; furthermore, such international instruments must be approved by the Colombian Congress, and the note of 22 November 1952 is neither an international treaty nor a convention and was never approved by Congress".

31. At that point — and it is very important to take note of this — the Ministry of Foreign Affairs inserted itself into the proceedings and raised several objections, including one relating to lack of competence. The Ministry of Foreign Affairs based this objection on the fact that "the act whose nullification is requested is a legal act of an international character which transcends domestic law and is governed by the rules of international conventional or customary law".

32. In a written statement presented during the proceedings, the prosecutor of the Council recognized that "from the point of view of the content and the nature or essence of the administrative act, there can be no doubt that this is a unilateral act of the Colombian Government aimed at bringing an end to the talks between Venezuela and Colombia concerning the Los Monjes archipelago ...".

33. On 22 October 1991 the Council of State "declared diplomatic note No. GM-542 of 22 November 1952 to be nullified ...".

34. The most important question that arises concerns the legal effect at the international level of a decision by the Council of State concerning an international legal act of the State, such as that contained in the 1952 note from the Minister for Foreign Affairs of Colombia. The contradiction between the position of the Colombian Government and that of the Council of State leads to consideration of the nature of such acts and whether they must be consistent with constitutional norms, especially when, as in this case, issues relating to State boundaries are involved.

35. The Colombian Government has taken a position which appears to imply acceptance of this note, although caution has prevailed in the official statements made by the authorities and negotiators of the two countries. It should also be noted

that the talks held by the parties on the topic of delimitation of marine and undersea areas in the Gulf of Venezuela — which therefore covers the very important matter of sovereignty over the Los Monjes archipelago — are, as agreed by the parties themselves, confidential. But the Government's attitude in the proceedings could reflect its acceptance of the note as valid at the international level, an important type of unilateral conduct that will not be considered in this report.

## B. Declaration of the Minister for Foreign Affairs of Cuba concerning the supply of vaccines to the Eastern Republic of Uruguay[19]

36. Second, we will examine the declaration made by the Minister for Foreign Affairs of Cuba on 4 April 2002 concerning the supply of vaccines to the Eastern Republic of Uruguay.

37. It should be noted by way of context that political relations between the two countries were seriously strained at that time.[20] In December 2001 the Government of Uruguay expressed its desire to purchase from Cuba a batch of anti-meningitis vaccines; the Cuban Government decided to supply the vaccines in response to that request.

38. What was involved was a declaration whereby Cuba expressed its willingness to supply the requested vaccines and to send them immediately. Cuba also declared that it did not wish the shipment to be a commercial transaction and that it waived the economic profit it would otherwise have obtained in return for a reduction of its debt to Uruguay in an amount equivalent to the value of the donation.

39. In this case there was a reaction on the part of the Uruguayan Government, which rejected the donation, and the Central Bank of Uruguay deducted the price of the vaccines from Cuba's debt to Uruguay.

40. For Cuba what was at issue was a donation,[21] whereas for Uruguay it was a commercial transaction, and it therefore rejected the Cuban act in the sense in which it was intended, a move Cuba opposed. The Central Bank of Uruguay deducted the amount of the "sale" from Cuba's debt to Uruguay, while the Central Bank of Cuba did not recognize the transaction, deeming it to be a donation, so that in its view, and in its books, the debt to Uruguay remained the same.

41. This act was neither modified nor revoked.

42. At issue for Cuba was a unilateral legal act which produced legal effects from the moment it was formulated, regardless of Uruguay's reaction. That is, it was a unilateral act constituting a donation. For Uruguay, on the other hand, the act did not have the effect of a donation, but rather involved a commercial transaction, in view of "its nature, its context and its intended purpose".[22]

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[19] Based on the contribution provided by Mr. D. Opertti-Badan.

[20] For reference, see the document posted on the website of the Ministry of Foreign Affairs of Cuba, dated 12 May 2002, which sets forth Cuba's position on the decision taken by the Government of Uruguay (http://www.cubaminrex.cu/Declaraciones/2002/DC_025002.htm).

[21] The declaration in question states: "The Government of Cuba will keep its word, and early in June will deliver to Uruguay the remaining 800,000 of the total 1,200,000 doses of meningitis vaccine which it is committed to donating" (ibid.).

[22] Opinion of Mr. D. Opertti-Badan, as stated in his written contribution on the topic, sent to the Special Rapporteur.

43. The question has not been resolved. Regardless of the subject matter, the essential point is to determine whether Cuba's act of donating did or did not constitute a unilateral act containing a promise, specifically a promise not to demand any payment from the Uruguayan Government. Of course, the situation is unclear in view of Uruguay's reaction in not accepting the donation and instead treating it as a commercial transaction. The case is of interest because of the addressee's refusal, a reaction that could affect the implementation of the Cuban declaration and even modify its legal effects, without changing its character as a unilateral act.

## C. Jordan's waiver of claims to the West Bank territories[23]

44. Third, we will examine the statement made by the King of Jordan on 31 July 1988 waiving Jordan's claims to the West Bank territories.[24] The King of Jordan, in an address to the citizens of his country, declared that Jordan was dismantling its "legal and administrative" links with the West Bank, a territory that formed part of Palestine under the mandate given to the United Kingdom and that was occupied by Jordan in 1950 following the first war between the Arab countries and Israel.

45. The statement took the form of a speech by the King to his fellow citizens, but it was also addressed indirectly to the international community. Its chief addressees were Israel and the Palestine Liberation Organization (PLO).

46. The statement by the King of Jordan signified a waiver of claims to the West Bank territory and entailed the dismantling of legal and administrative links with it.

47. The unilateral act or declaration occurred in the context of a process that began with the birth of the PLO and its recognition as the sole legitimate representative of the Palestinian people by the Arab Summit Conference held in Rabat in 1974. The address by the King of Jordan refers to his country's positive response regarding the Palestinian people's wish for unity with Jordan in 1950, as well as the wish of the PLO, as the sole legitimate representative of the Palestinian people, to establish a Palestinian State. On 15 November 1988, the Palestine National Council, at the conclusion of its meeting in Algiers, adopted a declaration proclaiming the establishment of the State of Palestine.[25]

48. The PLO expressed surprise at Jordan's decision, although it ultimately accepted the share of responsibility that Jordan had assumed with respect to the administration of the West Bank. In the Proclamation of the Independent State of Palestine, of 15 November 1988, the PLO made no reference to the address by the King of Jordan concerning the West Bank, mentioning only the end to the occupation of the Palestinian territories. Israel, for its part, ultimately recognized that a solution must be found with the PLO, as is evidenced by the series of agreements concluded since 1991.

49. It should also be noted that Jordan never afterwards claimed the right to speak on behalf of the ceded territory.

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[23] Information provided by Mr. R. Daoudi.

[24] Reproduced in *International Legal Materials* (*ILM*) (1988), pp. 1637 et seq.

[25] See M. Flory, "Naissance d'un État palestinien", *Annuaire Français de Droit International* (*AFDI*) (1989), pp. 385-415.

50. The reaction of other States is also interesting. The United States of America, through its Secretary of State, George Schultz, declared on 14 December 1988 that the status of the West Bank and the Gaza Strip could not be settled or established by unilateral acts, but only through negotiation. The United States did not recognize the proclamation of an independent Palestine.[26]

51. There were other significant reactions. France did not recognize the State of Palestine, because, according to the Ministry of Foreign Affairs, it did not have a defined territory. On the other hand, the 95 States that did recognize Palestine in 1988 recognized that the West Bank was under the responsibility of the PLO. In 1988 the General Assembly (by 104 votes in favour, 2 against and 36 abstaining) acknowledged the proclamation of the State of Palestine.[27]

52. The key point is that this statement was contained in an address by the King of Jordan, so that it constituted a unilateral waiver of a claim to part of Jordan's territory.[28]

53. The question arises whether the King was competent to act at the international level and to formulate the waiver on behalf of Jordan. It is significant that the Constitution of Jordan prohibits any act related to the transfer of territory, so that it would appear that the King exceeded his authority. However, that did not prevent the waiver from producing legal effects, and in fact a transfer of the territory of the West Bank to the State of Palestine actually took place.

54. What we have here, as we will see in section III, is the subsequent confirmation of an act formulated by a person not competent to do so under the domestic laws of the State in question. The unilateral act was confirmed by subsequent domestic acts.

## D. The Egyptian declaration of 24 April 1957[29]

55. Fourth, we will consider the Egyptian declaration of 24 April 1957, which has been extensively discussed in the literature on international law.[30] This is a declaration made by the Government of the Arab Republic of Egypt "in accordance with the Constantinople Convention of 1888".

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[26] See *American Journal of International Law* (*AJIL*), vol. 83 (1989), p. 348.

[27] General Assembly resolution 43/177 of 15 December 1988.

[28] See, in this regard, *Revue Générale de Droit International Public* (*RGDIP*), vol. 93 (1989), p. 142.

[29] Information provided by Mr. C. Chee.

[30] See, for example, J. Dehaussy, "La declaration égyptienne de 1957 sur le canal de Suez", *AFDI*, vol. 6 (1960), pp. 169-184; V. D. Degan, *Sources of International Law* (1997), pp. 300-301; I. Brownlie, *Principles of Public International Law*, 5th ed. (1998), p. 274; T. Huang, "Some International and Legal Aspects of the Canal Question", *AJIL*, vol. 51 (1957), pp. 277-307; R. Jennings, and A. Watts, *Oppenheim's International Law*, vol. 1, 9th ed. (1992), pp. 592-595, 1190; E. Lauterpacht, ed., *The Suez Canal Settlement* (1960); A. D. McNair, *Law of Treaties* (1961), p. 11; D. P. O'Connell, *International Law*, 1970 ed., vol. I, p. 201; C. Rousseau, *Droit International Public*, vol. I (Paris, 1970), p. 426; A. Rubin, "The International Legal Effects of Unilateral Declarations", *AJIL*, vol. 71 (1977), pp. 1-30; M. Shaw, *International Law* (2003), p. 461; E. Suy, *Les actes juridiques unilatéraux en droit international public* (Paris, 1962), pp. 140-141; P. De Visscher, "Les aspects juridiques fondamentaux de la question de Suez", *RGDIP*, vol. 62 (1962), pp. 440-443; M. Whiteman, *Digest of International Law*, vol. 3 (1964), pp. 1076-1130.

56. The Egyptian Government promised to respect the terms and spirit of the Constantinople Convention of 1888 and the rights and obligations arising therefrom. It also promised to maintain free and uninterrupted navigation for all nations within the limits of and in accordance with the provisions of the Constantinople Convention of 1888.

57. The declaration of 24 April 1957 sets forth a number of actions that the Egyptian Government promised to perform in relation to the operations and management of the Suez Canal Authority established by the Government on 26 July 1956, including some matters relating to financing.

58. The declaration specifies:

> "The Government of Egypt makes this Declaration, which re-affirms ... the ... Convention of 1988, as an expression of their desire and determination to enable the Suez Canal to be an efficient and adequate waterway linking the nations of the world and serving the cause of peace and prosperity.
>
> "This Declaration, with the obligations therein, constitutes an international instrument and will be deposited and registered with the Secretariat of the United Nations."

59. The declaration was formulated following the nationalization of the Universal Company of the Suez Maritime Canal promulgated by President Nasser on 26 July 1956. The Governments of the United Kingdom, France and the United States protested the nationalization as being contrary to international law.

60. In August 1956 a conference was held in London, attended by representatives of 22 States. A proposal, supported by 18 States, to create an international board for the Suez Canal, was rejected by President Nasser in September 1956. In September a second conference was held at which a declaration was adopted calling for the creation of the Suez Canal Users' Association, which was formally established on 1 October 1956. On 13 October 1956, the United Nations Security Council adopted resolution 118 (1956) reaffirming the principle of free transit through the Canal. At the end of October and beginning of November 1956 a crisis point was reached, and British, French and Israeli forces invaded the Canal Zone. Hostilities continued until the General Assembly adopted resolution 997 (ES-I) on 2 November 1956 calling for a ceasefire and reiterating the importance of the principle of freedom of navigation through the Canal.

61. The declaration by Egypt reaffirmed its adherence to the terms and spirit of the Constantinople Convention. Accordingly, the Egyptian Government would ensure freedom of navigation through the Canal, while stressing that the Egyptian Government had sovereign control over the Canal.

62. The declaration was addressed not only to the States members of the Suez Canal Users' Association but to the entire international community. It constituted a declaration *erga omnes*.

63. The States members of the Suez Canal Users' Association continued to use the Canal in accordance with the 1888 Convention, sidestepping the question of the validity of the Egyptian declaration. The representative of France to the Security Council emphasized that position, stating that:

> "... [a] unilateral declaration, even if registered, cannot ... be anything more than a unilateral act, and we must draw the conclusion from these findings that just as the Declaration was issued unilaterally, it can be amended or annulled in the same manner".[31]

64. The reaction of third parties is reflected in the Security Council resolution of 13 October 1956[32] and the General Assembly resolution of 2 November 1956.[33]

65. The Egyptian declaration of 1957 may be considered a unilateral act, at least formally, or may be viewed in the context of the implementation of the 1888 Convention.

66. The declaration was published in the United Nations *Treaty Series*[34] and was executed. However, it should be noted that Israeli ships were prevented from using the Canal until 1979, when the peace treaty between Israel and Egypt was signed.

67. The declaration has not been modified.

68. The legal literature, as we have said, has considered the Egyptian declaration of 1957 in great detail. For Degan, "[t]his situation proves how a State can find it perfectly fit for its interest to assume sometimes far-reaching obligations unilaterally, rather than to negotiate on them with other interested States. It therefore proves that there should not be doubt, as a matter of principle, concerning the legal effect of unilateral undertakings simply because they are not stipulated in a formal treaty".[35]

69. For Rubin, "[i]n so far as it could be interpreted to be an offer to enter into a treaty, this declaration was specifically rejected by the Suez Canal Users' Association, the body which appears to come as close as any to an offeree in the traditional contract sense".[36] The author goes on to say, "It is possible to construe the Egyptian declaration as a true unilateral declaration ... confronting the international community with the need to determine its legal efficacy in practice". In the same article the author concludes that the 1957 declaration "reveals no consensus supporting a rule asserting an international obligation to be created by a unilateral declaration, uttered publicly and with an intent to be bound, in the absence of additional factors such as a negotiating context, an affirmative reaction from other States, a tribunal to receive the declaration officially, or a supporting pre-existing obligation".[37]

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[31] See A. C. Kiss, *Repertoire de la pratique française en matiere de droit international public (1790-1958)*, vol. I (Paris), p. 618.

[32] Security Council resolution 118 (1956).

[33] General Assembly resolution 997 (ES-I).

[34] United Nations *Treaty Series*, No. 3821, vol. 265, p. 299.

[35] V. D. Degan, *Sources of International Law* (1997), p. 301.

[36] A. Rubin, "The International Legal Effects of Unilateral Declarations", *AJIL*, vol. 71 (1997), p. 6.

[37] Ibid., p. 7.

## E. Statements made by the Government of France concerning the suspension of nuclear tests in the South Pacific[38]

70. Fifth, we will consider the statements made by various representatives of the Government of France in relation to the Nuclear Tests case considered by the International Court of Justice, as referred to in earlier reports.[39]

71. These statements include those made by the President of the French Republic on 8 June and 25 July 1974; a note dated 10 June 1974 from the French Embassy in Wellington addressed to the Ministry of Foreign Affairs of New Zealand; a letter dated 1 July 1974 from the President of the French Republic to the Prime Minister of New Zealand; two statements by the French Ministry of Defence, dated 16 August and 11 October 1974; and a statement made to the General Assembly by the Minister for Foreign Affairs of France on 25 September 1974.

72. These statements were made in various forms: a communiqué from the Office of the President of France, a diplomatic note, a letter from the President of France, a statement made during a press conference, statements to the French press, and a statement made to an international body, the General Assembly.

73. The content of these statements, made in different forms, reflects a single idea: they all refer to the suspension by France of its nuclear tests in the South Pacific. The statement by the President of France reflects his Government's position in relation to the aforementioned dispute. In his statement of 25 July 1974, the President of France said that "on this question of nuclear tests, you know that the Prime Minister had publicly expressed himself in the National Assembly in his speech introducing the Government's programme. He had indicated that the French nuclear testing would continue. I had myself made it clear that this round of atmospheric tests would be the last, and so the members of the Government were completely informed of our intentions in this respect."[40]

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[38] Information provided by Mr. A. Pellet. We thank him for that information and for his tireless work as Chairman of the Working Group on Unilateral Acts of States during the previous sessions.

[39] The bibliography relating to the issue of nuclear tests is extensive. To cite a few non-exhaustive examples: B. Bollecker-Stern, "L'affaire des essais nucléaires français devant la Cour Internationale de Justice, *AFDI* vol. 20 (1974), pp. 299-333; J.-P. Cot, "Affaires des essais nucléaires (Australie c. France et Nouvelle Zélande c. France). Demandes en indication des mesures conservatoires: Ordonnances du 22 juin 1973", *AFDI* vol. 19 (1973), pp. 252-271; G. de la Charrière, "Cour Internationale de Justice: Commentaires sur la position juridique de la France à l'égard de la licéité de ses expériences nucléaires", *AFDI* vol. 19 (1973), pp. 235-251; P. M. Dupuy, "L'affaire des essais nucléaires français et le contentieux de la responsabilité internationale publique", *German Yearbook of International Law (GYBIL)* vol. 20 (1977), pp. 375-405; T. M. Franck, "World Made Law: The Decision of the ICJ in the Nuclear Test Cases", *AJIL* vol. 59 (1975), pp. 612-622; J. Juste Ruiz, "Nota a las sentencias del Tribunal Internacional de Justicia de 20 de diciembre de 1974 en los asuntos de las pruebas nucleares (Australia c. Francia; Nueva Zelandia c. Francia)", *Revista Española de Derecho Internacional (REDI)* vol. 29 (1976), pp. 447-461; "Mootness in International Adjudication: The Nuclear Tests Cases", *GYBIL* vol. 20 (1977), pp. 358-374; R. St. J. MacDonald and B. Hough, "The Nuclear Tests Case Revisited", *GYBIL* vol. 20 (1977), pp. 337-357; S. Sur, "Les affaires des essais nucléaires (Australie c. France et Nouvelle-Zélande c. France) C.I.J. - Arrêts du 20 décembre 1974", *RGDIP* vol. 79 (1975), pp. 972-1027; H. Thierry, "Les arrêts du 20 décembre 1974 et les relations de la France avec la Cour Internationale de Justice", *AFDI* vol. 20 (1974), pp. 286-298.

[40] *Cases concerning Nuclear Tests* (Australia v. France, decision of 20 December 1974, p. 266, para. 37); *Case concerning the Nuclear Tests (New Zealand v. France), I.C.J. Reports 1974*, p. 471, para. 40.

74. The statement by the Minister for Foreign Affairs to the General Assembly is also important in this context. On that occasion, the Minister stated that France had "now reached a stage in our nuclear technology that makes it possible for us to continue our programme by underground testing and we have taken steps to do so as early as next year".[41]

75. According to the Court itself, France "made public its intention to cease the conduct of atmospheric nuclear tests following the conclusion of the 1974 series of tests".[42] Furthermore, the French Government "was bound to assume that other States might take note of these statements and rely on their being effective".[43]

76. The French statements were addressed to the Governments of Australia and New Zealand. However, the Court pointed out that the statements had been "made outside the Court, publicly and *erga omnes*, even if the first of them (from the office of the President of France, dated 8 June 1974) was communicated to the Government of Australia.[44]

77. Reactions to the statements were heard. The Government of Australia, as the direct addressee, stated that "The Australian Government had noted the French Government's statements expressing an intention to cease atmospheric testing after the present series was completed. As Senator Willesee had pointed out, these statements were a step in the right direction, but the French Government had not given the Australian Government any satisfactory commitment that further atmospheric tests would not be held."[45]

78. During the pleadings before the Court, Australia's counsel stated as follows:

> "The statement by the French President requires close scrutiny. I must emphasize the basic distinction between an assertion that tests will go underground and an assurance that no further atmospheric tests will take place. Even though France said it 'will be in a position to move to the stage of underground firings', this in no way precludes it from a continuation or resumption of atmospheric tests, possibly even in conjunction with underground tests ... Moreover, nothing has been said to the Australian Government in its discussions with the French Government suggesting that the latter dissents from this understanding of the position. The French Government has never given the assurances which the Australian Government has sought regarding atmospheric testing.
>
> ... ...
>
> The concern of the Australian Government is to exclude completely atmospheric testing. It has repeatedly sought assurances that atmospheric tests will end. It has not received these assurances. The recent French Presidential statement cannot be read as a firm, explicit and binding undertaking to refrain from further atmospheric tests.
>
> It follows that the Government of France is still reserving to itself the right to carry out atmospheric nuclear tests. The risk that this policy will lead

[41] *I.C.J. Reports 1974*, p. 266, para. 39; ibid., p. 471, para. 42.
[42] Ibid., p. 267, paras. 41 and 51, respectively, and p. 474, para. 53.
[43] Ibid., p. 269, para. 51 and p. 474, para. 53.
[44] Ibid., para. 50.
[45] *I.C.J. Pleadings, Nuclear Tests*, vol. 1, p. 551.

to further atmospheric tests in 1975, and in subsequent years continues to be a real one. In legal terms, Australia has nothing from the French Government which protects it against any further atmospheric tests, should the French Government decide to hold them. These judicial proceedings are as relevant and as important as when the Australian application was filed."[46]

79. There were no third-party reactions to the French declarations.

80. In terms of execution, there were complaints by New Zealand[47] following the new underground tests carried out by France in 1995. There were also complaints from Australia, the Federated States of Micronesia, the Marshall Islands, Samoa and the Solomon Islands.

81. In that regard the Court, in 1995, noted as follows:

> "Whereas the basis of the Judgment delivered by the Court in the case of the Nuclear Tests (New Zealand v. France) was consequently France's undertaking not to conduct any further atmospheric nuclear tests; whereas it was only, therefore, in the event of a resumption of nuclear tests in the atmosphere that that basis of the Judgment would have been affected; and whereas that hypothesis has not materialized."[48]

82. The unilateral act of the French State was not the subject of any modification. Concerning the possibility of a reconsideration of the act, the Court stated that "the unilateral undertaking resulting from these statements cannot be interpreted as having been made in implicit reliance on an arbitrary power of reconsideration".[49] Concerning its termination, New Zealand, in its complaint filed in 1995, stated: "It is, in passing, pertinent to observe that no time was associated with the [1974] French undertakings."[50]

83. The legal effect of these statements was clearly expressed by the Court in its decisions of 1974:

> "His statements, and those of members of the French Government acting under his authority, up to the last statement made by the Minister of Defence ... must be held to constitute an engagement of the State, having regard to their intention and to the circumstances in which they were made."[51]
>
> In that regard, the Court added:

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[46] Sixth public hearing of 4 July 1974, Senator Murphy, *I.C.J. Pleadings, Nuclear Tests*, vol. 1, pp. 389-390.

[47] See in this regard L. Daniele, "L'ordonnance sur la demande d'examen de la situation dans l'affaire des essais nucléaires et le pouvoir de la Cour Internationale de Justice de régler sa propre procédure", *RGDIP* vol. 100 (1996), pp. 653-671; V. Coussirat-Coustère, "La reprise des essais nucléaires français devant la Cour Internationale de Justice (Observations sur l'ordonnance du 22 septembre 1995)", *AFDI* vol. 41 (1995), pp. 354-364. See also a reference to this issue in "Chronique des faits internationaux", *RGDIP* vol. 99 (1995), p. 978.

[48] *I.C.J. Reports 1995*, pp. 305-306, para. 62.

[49] *I.C.J. Reports 1974*, p. 270, para. 51, and p. 475, para. 53.

[50] "Petition on the consideration of the situation", dated 21 August 1995, p. 32, para. 63.

[51] *I.C.J. Reports 1974*, p. 269, para. 49, and p. 474, para. 51.

"[It] finds that France has undertaken the obligation to hold no further nuclear tests in the atmosphere in the South Pacific."[52]

## F. Protests by the Russian Federation against Turkmenistan and Azerbaijan[53]

84. Sixth, we will consider a number of acts by the Russian Federation containing a protest, against the Republic of Turkmenistan and the Republic of Azerbaijan, respectively, in relation to the status of the waters of the Caspian Sea.

85. The first case refers to a protest formulated by means of a diplomatic note, dated 6 January 1994, addressed to the Government of the Republic of Turkmenistan on the occasion of the adoption "of the State boundary law which establishes internal and territorial waters of that State in the Caspian Sea".

86. It should be recalled that, until the dissolution of the Union of Soviet Socialist Republics (USSR), the legal status of the Caspian Sea was governed by the Treaty entered into with Persia in 1921 and the 1940 Commerce and Navigation Treaty between the USSR and the Islamic Republic of Iran. These treaties establish the freedom of navigation and fisheries, excluding the 10-mile coastal zone, where fisheries are reserved for the ships of the coastal State.

87. In 1993, Turkmenistan adopted an Act on State Frontiers, establishing that State's internal waters and territorial sea in the Caspian Sea.

88. "The Russian Federation is of the opinion that the legal regime of the Caspian Sea is still determined by the above-mentioned treaties until a new legal regime is agreed by the coastal States. The Caspian Sea being a body of water having no natural link with the global ocean — in other words, a lake — it is therefore not subject to the provisions of the international law of the sea, including those of the 1982 United Nations Convention on the Law of the Sea, unless agreed upon mutatis mutandis by all coastal States. Negotiations among coastal States with a view to developing a new treaty on the legal status of the Caspian Sea began in 1994 and are still in progress. The Russian Federation does not recognize any unilateral territorial or jurisdictional claim of other coastal States over a part of the Caspian Sea until these negotiations have been completed and the new legal status of the Caspian Sea is agreed."[54]

89. The objective of the note is, first, to inform Turkmenistan that the Russian Federation does not consider its claim and the actions based on it to be consistent with international law and the current legal regime governing the Caspian Sea, as defined in the 1921 and 1940 treaties between the USSR and the Islamic Republic of Iran.

90. Second, by this protest note the Russian Federation confirms that it does not accept, recognize or agree to the territorial or jurisdictional claims of Turkmenistan.

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[52] *I.C.J. Reports 1974*, p. 270, para. 52; p. 271, para. 56; p. 475, para. 55; and p. 476, para. 59. See also "Petition on the consideration of the situation", Order dated 22 September 1995, *I.C.J. Reports 1995*, p. 305, para. 61. It should be noted that the complaint by New Zealand refers not to the failure to comply with the statements, but to the decision of 1974.

[53] Document provided by Mr. R. Kolodkin, April 2005.

[54] Idem.

91. Third, the author State confirms its position that such claims have no basis in international law.

92. Fourth, it confirms that "the Russian Federation does not accept or recognize Turkmenistan's action based on legally unfounded territorial or jurisdictional claims".

93. Fifth, the Russian Federation confirms its rights "and in particular its right to exercise free navigation and fisheries (exploitation of living resources) in areas which are claimed by Turkmenistan to fall under its sovereignty or jurisdiction".

94. Sixth, it is necessary to prevent a situation whereby silence on the part of the Russian Federation could be invoked against it in the future as a tacit acceptance of or acquiescence in the claims of Turkmenistan.

95. Lastly, the intent is to "prepare the basis for eventual future diplomatic or legal counteraction".

96. The protest submitted would undeniably have a clear legal effect, based upon the content, objective and form of the act. It is a legal act in response to a previous domestic legal act (conduct on the part of Turkmenistan at the domestic level which has unavoidable consequences at the international level).

97. The protest note falls within a process of negotiations between the two States which is still in progress. We are not yet aware of any reaction on the part of the addressee.

98. Presumably the note has been neither modified nor revoked; the legal claim of the Russian Federation therefore remains in force.

99. The second diplomatic note sent by the Russian Federation, dated 21 November 1995, is addressed to the Government of the Republic of Azerbaijan. Like the previous one, it is a protest note in response to the publication of the official draft Constitution, in which a part of the Caspian Sea is described as national territory.[55]

100. The context of the note is similar to that of the one addressed to the Government of Turkmenistan, as described above.[56]

101. The objective of the note is also similar.

102. The note was addressed to the Government of Azerbaijan via that country's Ministry of Foreign Affairs.

103. The protest presented would doubtless have a clear legal effect, based on the content, objective and form of the act. It is a legal act in response to a domestic legal act which could signify conduct by Azerbaijan at the international level.

104. The protest note falls within a process of negotiations between the two States which is still in progress. We are not yet aware of any reaction on the part of the addressee.

105. Presumably the note has been neither modified nor revoked; the legal claim of the Russian Federation therefore remains in force.

[55] Idem.
[56] Idem.

## G. Statements made by nuclear-weapon States[57]

106. Seventh, we will consider declarations made by nuclear-weapon States guaranteeing the non-use of such weapons against non-nuclear-weapon States.[58] These are negative security guarantees, which have previously been considered by the Commission. Such statements were made by the Ministry of Foreign Affairs of the Russian Federation to the Security Council on 5 April 1995;[59] by the Permanent Representative of the United Kingdom to the Conference on Disarmament on 6 April 1995;[60] by the United States Secretary of State on 5 April 1995;[61] by France, in its statement of 6 April 1995[62] and the statement of its Permanent Representative to the Conference on Disarmament; and by China on 5 April 1995.[63]

107. The form that these acts took, as can be noted, was that of a statement made to international bodies, contained in official documents of the Security Council.

108. The object of all the statements is similar: non-use of nuclear weapons against non-nuclear-weapon States; in some cases, however, there were conditions: except in the case of an invasion or any other attack on it, its territory, its armed forces or other troops, or against its allies or a State to which it has a security commitment, carried out or sustained by such a State, in association or alliance with a nuclear-weapon State.

109. The objective in all cases, as referred to in the preceding paragraph, is to guarantee to States parties to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) that nuclear weapons will not be used against them.

110. The act is addressed to non-nuclear-weapon States parties to the Treaty. The Chinese statement is made *erga omnes*.

111. The legal scope is, as previously indicated, to guarantee to those States the non-use of nuclear weapons against them. However, "exceptions could be made (except in the case of China) in case of invasion or any other attack against the nuclear Powers, their territory, their armed forces or their allies, or any State with which they have a security commitment, by a non-nuclear-weapon State in association or alliance with a nuclear-weapon State". Security Council resolution 984 (1995) also "is limited to demonstrating the commitment of the nuclear Powers, in case of use of such weapons against a non-nuclear-weapon State, to bring the situation to the attention of the Security Council in order to provide the necessary assistance to that State".[64]

112. The declarations have not been the subject of any modifications, nor have they been revoked or terminated, and therefore they remain in force. However, on the occasion of the Advisory Opinion of 8 July 1996, the nuclear-weapon States emphasized that, in their opinion, "there are circumstances in which resort to

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[57] Prepared on the basis of a contribution by Mr. A. Pellet.

[58] A/50/151-155; S/1995/261-265, dated 6 April 1995. In this regard, see E. del Mar García Rico, *El uso de las armas nucleares y el derecho internacional*, Madrid (1999), pp. 127-128.

[59] S/1995/261.

[60] S/1995/262.

[61] S/1995/263.

[62] S/1995/264.

[63] S/1995/265.

[64] See, in this regard, E. del Mar García Rico, op. cit., p. 127.

nuclear weapons would be lawful".[65] It would appear that the opinions expressed by the nuclear Powers are mainly political statements which are not legally binding upon their authors.

113. Reactions from the addressees include that of Ukraine, which stated that a "joint declaration ... which might have strengthened its psychological and political authority, as well as its effectiveness, might have been preferable ...".

114. For the Islamic Republic of Iran, for example, the statements should take the form of a negotiated and legally binding international agreement which should be annexed to the Treaty. For Romania, the statements constituted a major step which should not be underestimated. Pakistan, for its part, declared that only unconditional guarantees having binding force can effectively meet the security concerns of the non-nuclear-weapon States. For Malaysia, the form and content of the statements made an internationally negotiated and legally binding instrument all the more necessary.[66]

115. The attitude of the authors and the positions of most States appear to reflect the political nature of these statements, considered in previous years by the Commission, which expressed that same opinion on the subject.

## H. Ihlen Declaration of 22 July 1919[67]

116. Eighth, we will examine the oral declaration formulated by Mr. Ihlen, the Minister for Foreign Affairs of Norway, concerning Denmark's sovereignty over Greenland, which was considered by the Permanent Court of International Justice. The note has also been the subject of significant doctrinal studies.

117. The act in question was formulated by means of an oral declaration made by the Minister for Foreign Affairs of Norway and addressed to the Minister for Foreign Affairs of Denmark during a meeting between them.[68] The Norwegian Minister prepared a memorandum on the meeting for his Department that was transmitted to the Danish Minister.

118. During the meeting, the Danish Minister first indicated that his country had no interests in Spitzbergen and would not be opposed to Norway exercising its sovereignty over that territory. Later, the Danish Minister indicated that he wished to extend Denmark's economic and political interests to cover Greenland as a whole, that the United States was not opposed to that wish and that the Danish Government hoped that the Norwegian Government would not have any objections either.

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[65] See the statement by the United Kingdom on *Legality of the threat or the use of nuclear weapons. Request for Advisory Opinion, Written Statements, 1995*, p. 31, and the statement made by the United States, the Russian Federation and France, ibid., pp. 16, 15 and 44, respectively, cited by García Rico, op. cit., p. 127.

[66] Also worthy of note is the painstaking argumentation of Malaysia before the International Court of Justice concerning *Legality ... Written Statements*, pp. 12-13, referring to the contradictions into which the nuclear Powers fall when referring to the scope of the NPT as regards the possession and use of nuclear weapons. See E. García Rico, op. cit., p. 127.

[67] Prepared on the basis of the information provided by Mr. I. Brownlie.

[68] J. W. Garner, "The International Binding Force of Unilateral Oral Declarations", *AJIL*, vol. 27 (1933), pp. 493-497 (dedicated in particular to the analysis of the judgment of the Permanent Court of International Justice which formed the basis of the *Eastern Greenland* case).

119. In response, Mr. Ihlen, the Norwegian Minister, stated that "the Norwegian Government would not make any difficulties in the settlement of this question".

120. The meeting took place in the context of a wider discussion among States exercising sovereignty over Spitzbergen and Greenland. Denmark believed that if it did not interfere with Norway's wish to obtain sovereignty over Spitzbergen, Norway would not interfere with its own wish to exercise sovereignty over Greenland. In that connection, Denmark had sent a request to the United States and Norway. While the request made no specific mention of Denmark's wish to extend its sovereignty over Greenland, the United States interpreted it as such. In any event, the Norwegian Government was particularly interested in the east coast of Greenland, given the region's fishing and hunting opportunities.

121. The primary question that arises is whether the Ihlen Declaration is a unilateral act, definitive and unconditional in nature, as Denmark believed it to be at the time, or, conversely, whether it is an act that can be classified as a formal agreement.

122. There is disagreement over how to characterize this oral declaration. For instance, Lord McNair does not believe that it is opposable by virtue of estoppel. Instead, this author takes the view that we are dealing with a negotiation which gave rise to an international agreement. In this connection, several authors, including McNair, regard the Ihlen Declaration as an informal agreement. However, the Permanent Court is of the opinion that it is a unilateral act.

123. Although the Norwegian Government maintained that the Ihlen Declaration must be viewed in the context of an agreement, the Court finally held that the intentionality of the declaration was clear. Its intention was to ensure that neither Denmark nor Norway would oppose "Danish sovereignty over Greenland as a whole" nor occupy "part of Greenland".

124. The Permanent Court considered it to be a unilateral act that was binding upon Norway in the event that Greenland was recognized as part of Danish territory, and its Judgment read as follows:

> "The Court considers it beyond all dispute that a reply of this nature given by the Minister for Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs."[69]

125. The Court's decision to consider the declaration an act with binding force is interesting, in so far as it constitutes one of the first examples of an international judicial body ruling on actions of a Minister for Foreign Affairs which may give rise to an international commitment that is binding upon the State represented, hence the relevance of its analysis.

126. The same is true in respect of the question of the form of the declaration. In this connection, the opinion of Permanent Court Judge Anzilotti, which is included in the case file, is critical. He pointed out that "there does not seem to be any rule of international law requiring that agreements of this kind must necessarily be in writing, in order to be valid".[70]

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[69] *P.C.I.J., Series A/B* 1993, No. 53, p. 71.

[70] *P.C.I.J., Series A/B*, No. 43, p. 91.

## I. Truman Proclamation of 28 September 1945[71]

127. Ninth, we will examine the declaration of 28 September 1945 made by the President of the United States, Harry S. Truman, issued as a Presidential Proclamation and addressed to the international community.

128. The Proclamation states that:

> "... it is the view of the Government of the United States that the exercise of jurisdiction over the natural resources of the subsoil and seabed of the continental shelf by the contiguous nation is reasonable and just, since the effectiveness of measures to utilize or conserve these resources would be contingent upon cooperation and protection from the shore, since the continental shelf may be regarded as an extension of the land mass of the coastal nation and thus naturally appurtenant to it, since these resources frequently form a seaward extension of a pool or deposit lying within the territory, and since self-protection compels the coastal nation to keep close watch over activities off its shores which are of the nature necessary for utilization of these resources ...".

The Proclamation goes on to say that:

> "Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control. In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles. The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected ...".

129. The Proclamation deals with the management and exploitation of the resources of the seabed beneath the territorial sea, by the coastal State, a right accepted at the beginning of the twentieth century. By 1945 it was clear that the exploitation of the mineral resources of the continental shelf under the high seas — particularly petroleum resources — was not feasible on a significant scale, and in particular the United States was actively interested in offshore oil exploitation in the Gulf of Mexico and elsewhere.

130. The aim of the United States in issuing the Truman Proclamation was to establish its jurisdiction and control over the adjacent seabed of the continental shelf, and to establish that the sharing of the seabed with neighbouring States would be determined by mutual agreement in accordance with "equitable principles". The Proclamation was expressly not intended to affect the legal status of the high seas above the shelf and the right to "free and unimpeded navigation" in those waters.

131. Reaction to the Proclamation came from certain States, even though it was considered by the International Law Commission when it prepared the draft conventions on the law of the sea and by the International Court of Justice, which

[71] Based on the contribution of Mr. M. Matheson.

refers to it in its Judgment of 1969 concerning the North Sea continental shelf, which we will examine in due course.

132. Among the States which reacted was Mexico, a country adjacent to the United States, which issued a presidential declaration one month later, incorporating its continental shelf into its national territory.

133. Within a short time, the principle contained in the Truman Proclamation became widely accepted. In 1951, the International Law Commission included a provision in its draft articles on the law of the sea which stipulated that "the continental shelf is subject to the exercise by the coastal State of control and jurisdiction for the purpose of exploring it and exploiting its natural resources". Article 2 of the Geneva Convention on the Continental Shelf states that "the coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources".

134. In its judgment in the *North Sea Continental Shelf* cases, the International Court of Justice also refers to the Truman Proclamation:[72]

> "A review of the genesis and development of the equidistance method of delimitation can only serve to confirm the foregoing conclusion. Such a review may appropriately start with the instrument, generally known as the 'Truman Proclamation', issued by the Government of the United States on 28 September 1945. Although this instrument was not the first or only one to have appeared, it has in the opinion of the Court a special status. Previously, various theories as to the nature and extent of the rights relative to or exercisable over the continental shelf had been advanced by jurists, publicists and technicians. The Truman Proclamation, however, soon came to be regarded as the starting point of the positive law on the subject, and the chief doctrine it enunciated, namely that of the coastal State as having an original, natural, and exclusive (in short a vested) right to the continental shelf off its shores, came to prevail over all others, being now reflected in Article 2 of the 1958 Geneva Convention on the Continental Shelf. With regard to the delimitation of lateral boundaries between the continental shelves of adjacent States, a matter which had given rise to some consideration on the technical, but very little on the juristic level, the Truman Proclamation stated that such boundaries 'shall be determined by the United States and the State concerned in accordance with equitable principles'. These two concepts, of delimitation by mutual agreement and delimitation in accordance with equitable principles, have underlain all the subsequent history of the subject. They were reflected in various other State proclamations of the period, and after, and in the late work on the subject."[73]

The Court goes on to say that:

> "... [T]his régime furnishes an example of a legal theory derived from a particular source that has secured a general following. As the Court has recalled in the first part of its Judgment, it was the Truman Proclamation of

[72] *I.C.J. Reports 1969*, paras. 47 and 100.
[73] *I.C.J. Reports 1969*, pp. 33-34, para. 47.

28 September 1945 which was at the origin of the theory, whose special features reflect that origin ...".[74]

135. The Proclamation does not have a specific basis, apart from the aforementioned policies.

136. The Truman Proclamation was expanded upon in an executive order from the President, issued the same day, which places the natural resources of the adjacent continental shelf under the jurisdiction and control of the United States. The Proclamation was later confirmed and complemented by the adoption of the Outer Continental Shelf Lands Act by the Congress of the United States.

137. The Proclamation was not amended, revoked or denounced.

## J. Statements concerning the United Nations and its staff members (tax exemptions and privileges)

138. Unlike most of the cases analysed in this report, in this tenth example to be considered the addressee is the United Nations (or other international organizations connected with it, such as specialized agencies and their staff members). This is perhaps the feature that distinguishes this unilateral act (consisting of a linked series of statements) from the other cases presented.[75]

139. First of all, it should be noted that, since the various statements were spread out over time and were fairly similar in content, there are a number of dates to keep in mind when examining the content of the obligations that Switzerland claimed to assume.

140. The first of these dates is in April 1946, when a statement was made by a Councillor of State of the Canton of Geneva as a member of the Swiss delegation in the negotiations leading to the adoption of the Convention on the Privileges and Immunities of the United Nations.

141. The second date is 5 August 1946, when the head of the Federal Political Department released an official statement to the press.

142. Lastly, on 28 July 1955, nine years later, the latter statement was reiterated by the Swiss Federal Council in its message to the Federal Assembly. Hence, these three dates will help in determining the existence and content of the obligation assumed by Switzerland.

143. It will also be significant to identify the authors or organs who issued those statements and to determine whether they were competent to bind the State. The three acts considered will be analysed from a dual perspective: from the international perspective, considering by way of analogy the capacity to conclude international treaties as defined in the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 21 March 1986, and from the domestic perspective, with reference to the Constitution of the Swiss Confederation at the time of the events in question.

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[74] *I.C.J. Reports 1969*, p. 53, para. 100.

[75] The analysis of this case was provided by M. I. Torres Cazorla, Professor of International Law at the University of Málaga.

144. Chronologically, the first of these statements was made by Mr. Pérreard, a Councillor of State of the Canton of Geneva and also a member of the Swiss delegation charged with negotiating the Convention on the Privileges and Immunities of the United Nations. At the international level, the latter function is the relevant one, since it is in the context of Mr. Pérreard's duties as a member of the Swiss delegation that his actions have weight.

145. In that regard, it should be recalled that article 7, paragraph 2 (c), of the 1986 Convention states:

> "In virtue of their functions and without having to produce full powers, the following are considered as representing their State:
>
> "...
>
> "(c) representatives accredited by States to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that organization or organ;
>
> "..."

146. At the domestic level, Mr. Pérreard held the office of Councillor of State of one of the cantons (specifically, the Canton of Geneva, where the United Nations had and still has an office). Article 9 of the Constitution of Switzerland, in the version in force at the time the statement was made (the 1874 Constitution) states:

> "Exceptionally, the cantons retain the right to conclude treaties with foreign States concerning matters of public economy, neighbourly relations and police, provided such treaties contain nothing contrary to the Confederation or to the rights of other cantons."[76]

147. Does it follow, therefore, that the statement made by Mr. Pérreard fell within the powers that the Swiss Constitution or the laws of the country had accorded him? A look at the text of the statement may shed some light on the question. In the course of the negotiations, he stated that "the Geneva authorities were prepared to grant the United Nations the benefit of the same exemptions and the same privileges as had previously been granted to other international institutions".[77]

148. Mr. Pérreard said that the "Geneva authorities", that is, the authorities of the canton[78] he represented, could offer the United Nations the privileges and

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[76] This article should be read in conjunction with article 10 of the same Constitution, which states:

"(1) All official intercourse between the cantons and foreign governments or their representatives shall take place through the agency of the Federal Council.

"(2) The cantons may, however, correspond directly with subordinate authorities and officials of a foreign State with respect to the matters mentioned in Article 9."

[77] Quoted by L. Caflisch in *Annuaire suisse de droit international (ASDI)*, vol. 39 (1983), p. 182.

[78] As A. Pérez points out in "El régimen de privilegios e inmunidades aplicable a las Organizaciones Internacionales en Suiza y a las delegaciones permanentes extranjeras en Ginebra" (1997), which can be found on the following website: http://www.eda.admin.ch/geneva_miss/e/home/role/pigen.Par.0001.UpFile.pdf/xy_yymmdd_0123456789_1.pdf, p. 44, in a federal State like Switzerland, there is no single tax regime covering the entire country. The power to levy taxes, rates, emoluments and fees is held in parallel by the Confederation, the cantons and the communes. That being the case, tax privileges may differ for the beneficiary depending on his or her place of residence. It is clear that the tax exemptions provided for in the headquarters agreements undoubtedly applied to all three of those levels. The information was taken by the author from E. Bourgnon, "La Convention de Vienne sur les relations diplomatiques. Pratique Suisse" (Berne, 1993), mimeograph, p. 93.

exemptions enjoyed previously by other international institutions (with a clear allusion to the modus vivendi of 1921-1926, as amended in 1928, between Switzerland and the League of Nations,[79] discussed below.

149. The second of these statements was made at the Swiss Confederation level by Mr. Petitpierre, the head of the Federal Political Department, following a meeting with Trygve Lie, the Secretary-General of the United Nations at that time, on 5 August 1946. The content of the statement (which was placed in a more formal context by being embodied in an official press release) was broader than the first statement, in that it did not refer solely to the Canton of Geneva but to the Swiss authorities in general.[80]

150. Nine years later, the Swiss Federal Council, in its message to the Federal Assembly on 28 July 1955, again referred to the legal status in Switzerland of the United Nations, its specialized agencies and other international organizations (FF 1955 II 389, 393). According to the version of the Constitution then in force, under article 95 "the supreme executive and governing authority of the Confederation is a Federal Council composed of seven members".[81] One of the functions of the Federal Council under article 102 of the 1874 Constitution is to deal with foreign policy and international treaties.[82] That being the case, the Council was fully competent to declare the following: "... [W]e have given the United Nations the assurance that it would benefit from a regime at least as favourable, in all respects, as that granted to any other international organization in Swiss territory. In other words, the United Nations may ask to be granted the benefit of any advantage not specified in the provisional arrangement that we would grant to another international organization."

151. It should be noted that the above-mentioned three statements all took different forms: an oral statement, a press release and a message from the Federal Council to the Federal Assembly. The latter, the message from the Federal Council, is readily accessible, since it was published in the *Feuille fédérale suisse* (with the FF number cited above). As with the French declarations in the Nuclear Tests case, in this case there were a series of acts or statements that formed a single unilateral act, even though the statements were not identical, as will be demonstrated below.

152. It is noticeable that the statements evolved over time and space, resulting in an increasingly favourable regime for the United Nations and its staff members. As early as 1949 the trend attracted comment in the legal literature; one author specifically said that "the regime granted by the Swiss Federal Council has not been cut back; on the contrary, it has expanded in some respects".[83] The statements in question mark that trend.

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[79] League of Nations, *Official Journal*, 7th year, No. 10 (October 1926), pp. 1407 and 1422.

[80] The press release stated that "the Swiss authorities are prepared to grant the United Nations and its staff members treatment at least as favourable as the treatment granted any other international organization on Swiss territory" (See *ASDI*, vol. 39 (1983), p. 183).

[81] See http://mjp.univ-perp.fr/constit/ch1874.htm#ass. [For an English version see http://www.thisnation.com/library/switzerland.html.]

[82] Article 102, paragraph 7, states, "It shall examine the agreements of the cantons among themselves and with foreign States and shall approve them if they are admissible (Article 85(5))".

[83] As stated by G. Perrenoud in his concluding remarks in *Regime des Privilèges et Immunités* (Lausanne, 1949). For a complete treatment of the topic, see A. Pérez, "El regimen de privilegios

153. The context and circumstances in which the statements in question were made were quite specific. Although from today's perspective it could be said that the legal regimes applicable to international organizations with headquarters in Switzerland are the same,[84] since Switzerland applies the principle of equal treatment, the systems followed are not identical in terms of their basis. For some organizations, the origin of this treatment is to be found in a regime that dates back to 1921 and was applicable to the League of Nations and the International Labour Organization (the previously cited modus vivendi of 1921-1926, as amended in 1928). The first headquarters agreement following the Second World War in which the matter was dealt with was the agreement concluded with the Swiss Federal Council on 11 March 1946 (one month prior to the first of the statements under discussion) to regulate the legal status of the International Labour Organization in Switzerland. Article 16 of the agreement reads as follows:

> "The Director of the International Labour Office and officials of the categories designated by him and agreed to by the Swiss Federal Council shall enjoy the privileges, immunities, exemptions and facilities granted to diplomatic agents in accordance with international law and custom."[85]

Article 17, entitled "Immunities and facilities accorded to all officials", states as follows:

> "All officials of the International Labour Office, irrespective of nationality, shall enjoy the following immunities and facilities:
>
> "(a) Exemption from jurisdiction for all acts performed in the discharge of their duties;
>
> "(b) Exoneration from all federal, cantonal and communal taxes on salaries, emoluments and indemnities paid to them by the International Labour Organisation."

154. In order to analyse the legal effects of the statements in question, several documents must be considered that provide clues as to the approach taken by the Swiss Confederation in this regard. The first is the note dated 2 April 1979 from the International Law Directorate of the Federal Political Department, in which it confirmed "the binding nature of the statement made by Mr. Petitpierre on 5 August 1946 to Mr. Trygve Lie. As a result of the undertaking made by the head of the Political Department, the United Nations has been granted the benefit of the 'most-favoured-organization clause' and was thus authorized to demand the most favourable treatment that may be granted to another organization ...".[86]

155. A recent document entitled "Review of the Headquarters Agreements Concluded by the Organizations of the United Nations System: Human Resources

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e inmunidades applicable a las Organizaciones Internacionales en Suiza y a las delegaciones permanentes extranjeras en Ginebra" (1997), which can be found on the following website: http://www.eda.admin.ch/geneva_miss/e/home/role/pigen.Par.0001.UpFile.pdf/xy_yymmdd_0123456789_1.pdf, p. 68.

[84] A. Pérez, loc. cit., p. 25.

[85] *Recueil systématique du droit federal suisse*, RS 0.192.120.282. Also available in electronic version on http://www.admin.ch/ch/f/rs/i/0.192.120.282.fr.pdf. See also United Nations *Treaty Series*, vol. 15, No. 103, pp. 389-391.

[86] See L. Caflisch, loc. cit., p. 186.

Issues Affecting Staff"[87] sheds light on Switzerland's practice in this regard. Referring to the principle of "most favoured treatment", it states:

> "The adoption of the principle of most favoured treatment of international organizations would mean that any relevant arrangements and facilities granted by the host country of a given organization, but not enjoyed by organizations within the United Nations system, would automatically apply to all organizations within that particular host country. This would ensure continuous updating and modernizing of the headquarters agreements *following, for example, the current practice of the Swiss Federal Government*" (Special Rapporteur's italics).[88]

156. The same document gives a historical overview of existing agreements and specifically refers to the practice of Switzerland in that regard in the section on practice before and after the 1940s, as follows:

> "The Universal Postal Union (UPU) noted that it does not have a separate headquarters agreement with Switzerland. Given the position of UPU as a United Nations specialized agency, the Government of Switzerland decided that, as of January 1948, the Convention on the Privileges and Immunities of the United Nations concluded in 1946 between the Swiss Federal Council (...) and the United Nations Secretary-General would be applied by analogy to UPU, its organs, the representatives of its member States, to experts and to the staff members of the organization. The Parliament approved the decision in 1955. Since the application of the Swiss authorities' principle of equality of treatment of international organizations, the status of UPU is currently considered identical to other Swiss-based organizations."[89]

This practice has continued to be followed with other international organizations and their staff members, as described in the aforesaid document, even going beyond the provisions of their individual headquarters agreements.[90]

## K. Conduct of Thailand and Cambodia with reference to the *Temple of Preah Vihear* case[91]

157. Following this examination of a number of explicit acts or declarations constituting unilateral acts, as will be seen below, the final example to be examined in this section involves the conduct of Thailand and Cambodia between 1908 and 1909 and between 1908 and 1958 as considered by the International Court of Justice in connection with the *Temple of Preah Vihear* case.

158. This example, of course, does not involve a unilateral act *stricto sensu*, but rather State conduct that produced certain legal effects, in the Court's view.

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[87] JIU/REP/2004/2, prepared by I. Gorita and W. Münch (Geneva, 2004).

[88] JIU/REP/2004/2, p. vii.

[89] JIU/REP/2004/2, para. 9; see also para. 10, which discusses the World Health Organization in similar terms.

[90] The document discusses the issue in a number of places, including paras. 15, 19, 86, 88-92, 99-100 and 116-117.

[91] Based on the contribution provided by Mr. I. Brownlie.

159. The international legal literature has extensively discussed this conduct. The conduct in question relates to categories of silence, acceptance, acquiescence and estoppel, all forms of unilateral conduct of States that undoubtedly produce legal effects similar to the effects of an act considered as an expression of will formulated with the intention of producing legal effects.

160. The Court considered the concept of estoppel, as can be seen from the passage from its decision transcribed below, even though it nowhere refers to the concept by name:[92]

> "The Court will now state the conclusions it draws from the facts as above set out.
>
> "Even if there were any doubt as to Siam's acceptance of the map in 1908, and hence of the frontier indicated thereon, the Court would consider, in the light of the subsequent course of events, that Thailand is now precluded by her conduct from asserting that she did not accept it. She has, for fifty years, enjoyed such benefits as the Treaty of 1904 conferred on her, if only the benefit of a stable frontier. France, and through her Cambodia, relied on Thailand's acceptance of the map. Since neither side can plead error, it is immaterial whether or not this reliance was based on a belief that the map was correct. It is not now open to Thailand, while continuing to claim and enjoy the benefits of the settlement, to deny that she was ever a consenting party to it."[93]

161. It is interesting to note that in the reasoning of the Court the elements of estoppel and acquiescence are combined, as Judge Fitzmaurice points out in his separate opinion:

> "The principle of preclusion is the nearest equivalent in the field of international law to the common-law rule of estoppel, though perhaps not applied under such strict limiting conditions (and it is certainly applied as a rule of substance and not merely as one of evidence or procedure). It is quite distinct theoretically from the notion of acquiescence. But acquiescence can operate as a preclusion or estoppel in certain cases, for instance where silence, on an occasion where there was a duty or need to speak or act, implies agreement, or a waiver of rights, and can be regarded as a representation to that effect ..."

162. A second basis for the Court's decision was the subsequent conduct of Thailand, which, together with that of Cambodia, "in effect" constituted a boundary agreement. In that regard, the Court considered:

> "... that Thailand in 1908-1909 did accept the Annex I map as representing the outcome of the work of delimitation, and hence recognized the line on that map as being the frontier line, the effect of which is to situate Preah Vihear in Cambodian territory. The Court considers further that, looked at as a whole, Thailand's subsequent conduct confirms and bears out the original acceptance,

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[92] See, among others, R. Jennings, *The Acquisition of Territory* (Oxford, 1963), pp. 47-49; J. P. Cot, *AFDI* (1962), p. 244; E. Pecourt García, "El principio de estoppel y la sentencia del Tribunal Internacional de Justicia en el caso del Templo de Preah Vihear", *REDI*, vol. 16 (1963), pp. 153-166.

[93] *Case concerning the Temple of Preah Vihear, Merits, Judgment of 15 June 1962: I.C.J. Reports 1962*, p. 32; *British Yearbook of International Law (BYBIL)*, vol. 60 (1989), p. 33.

and that Thailand's acts on the ground do not suffice to negative this. Both parties, by their conduct, recognized the line and thereby in effect agreed to regard it as the frontier line."[94]

163. From a reading of the above-cited paragraph it is clear that a fundamental issue underlying the decision was the consideration of silence as acquiescence.[95]

164. The Court also invoked positive acts by Thailand indicating adoption of the map in 1908. The Court pointed out that:

> "It has been contended on behalf of Thailand that this communication of the maps by the French authorities was, so to speak, *ex parte*, and that no formal acknowledgement of it was either requested of, or given by, Thailand. In fact, as will be seen presently, an acknowledgement by conduct was undoubtedly made in a very definite way; but even if it were otherwise, it is clear that the circumstances were such as called for some reaction, within a reasonable period, on the part of the Siamese authorities, if they wished to disagree with the map or had any serious question to raise in regard to it. They did not do so, either then or for many years, and thereby must be held to have acquiesced. *Qui tacet consentire videtur si loqui debuisset ac potuisset.*"

165. The grounds for the Court's decision also included the element of acceptance (based on conduct), which modified the 1904 boundary treaty. In the Court's opinion:

> "There is finally one further aspect of the case with which the Court feels it necessary to deal. The Court considers that the acceptance of the Annex I map by the Parties caused the map to enter the treaty settlement and to become an integral part of it. It cannot be said that this process involved a departure from, and even a violation of, the terms of the Treaty of 1904, wherever the map line diverged from the line of the watershed, for, as the Court sees the matter, the map (whether in all respects accurate by reference to the true watershed line or not) was accepted by the Parties in 1908 and thereafter as constituting the result of the interpretation given by the two Governments to the delimitation which the Treaty itself required. In other words, the Parties at that time adopted an interpretation of the treaty settlement which caused the map line, in so far as it may have departed from the line of the watershed, to prevail over the relevant clause of the treaty. Even if, however, the Court were called upon to deal with the matter now as one solely of ordinary treaty interpretation, it considers that the interpretation to be given would be the same, for the following reasons."[96]

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[94] *I.C.J. Reports 1962*, pp. 32-33.

[95] See P. Cahier, "Le comportement des Etats comme source de droits et d'obligations", *Recueil d'études de droit international en homage à Paul Guggenheim* (Geneva, 1968), pp. 248-249; and I. Sinclair, "Estoppel and Acquiescence", *Essays in Honour of Sir Robert Jennings* (Cambridge, 1995), p. 110.

[96] *I.C.J. Reports 1962*, pp. 33-34.

166. It is worth stressing another aspect that the Court noted, namely, that in this context the concepts of estoppel or acquiescence mingle with the general rule of recourse to the subsequent practice of the parties as a means of interpretation of a treaty.[97]

167. The Court pointed out in that regard:

> "... Thailand contends that since 1908, and at any rate up to her own 1934-1935 survey, she believed that the map line and watershed line coincided, and therefore that if she accepted the map line, she did so only in that belief. It is evident that such a contention would be quite inconsistent with Thailand's equally strongly advanced contention that these acts in the concrete exercise of sovereignty evidenced her belief that she had sovereignty over the Temple area: for if Thailand was truly under a misapprehension about the Annex I line — if she really believed it indicated the correct watershed line — then she must have believed that, on the basis of the map and her acceptance of it, the Temple area lay rightfully in Cambodia. If she had ... accepted the Annex I map only because she thought it was correct — then her acts on the ground would have to be regarded as deliberate violations of the sovereignty which (on the basis of the assumptions above stated) she must be presumed to have thought Cambodia to possess. The conclusion is that Thailand cannot allege that she was under any misapprehension in accepting the Annex I line, for this is wholly inconsistent with the reason she gives for her acts on the ground, namely that she believed herself to possess sovereignty in this area."[98]

## II. Conclusions that can be drawn from the statements analysed

168. From the statements, acts and conduct examined above — which, of course, provide only a few examples of State practice, analysed in detail in accordance with the criteria established by the Commission at its 2004 session — a few conclusions can be drawn that may make it possible to formulate some basic principles derived from this practice. As will be seen, some of these principles are based on draft articles submitted by the Special Rapporteur in earlier reports and on some of the guidelines established by the Working Group at its meetings. Some of the ideas which emerge from the analysis concern the formulation of acts and, in particular, their definition, the capacity of the State and the capacity of the organ making the statement.

169. It should first be noted that the examples given are unilateral acts expressed in very different ways, including official notes, public declarations, presidential proclamations, political speeches and even conduct signifying acceptance or acquiescence, which will be discussed separately at the end of this section.

170. The first conclusion that can be drawn is that the form is relatively unimportant in determining whether we are dealing with a unilateral legal act of the type in which the Commission is interested — in other words, an act that can produce legal effects on its own without the need for its acceptance, or for any other

[97] See, in this regard, J. P. Cot, *AFDI* (1962), pp. 235-240, and H. Thirlway, "The Law and Procedure of the International Court of Justice", *BYBIL*, vol. 60 (1989), pp. 47-49.

[98] *I.C.J. Reports 1962*, p. 33.

reaction on the part of the addressee, as the International Court of Justice established in the *Nuclear Tests* case (a decision discussed in previous reports). However, it may still be considered that the formality of the act has a role to play in determining the intent of its author. An oral statement made in an informal context may be less clear, in that regard, than an oral statement made before an international body or than a diplomatic note, which is of course drafted in a more formal manner and is therefore clearer, since the addressee can have direct access to its content. The form can have an impact insofar as a statement may be considered to produce legal effects.

171. Second, it can be seen that these are acts formulated by States: Colombia, Cuba, Egypt, France, Jordan, Norway, the Russian Federation, Switzerland and the United States. The addressee of these acts also varies widely: they may be addressed to other States, the international community, an entity which has not yet been consolidated as a State (a State *in status nascendi*) or an international organization.

172. It may be inferred from this that, as in the sphere of the law of treaties, the State is endowed with international capacity — which is intrinsic to it — to commit itself or develop legal relations at the international level through unilateral acts. The provision relating to the "capacity of the State" to conclude treaties, contained in article 6 of the 1969 Vienna Convention on the Law of Treaties, might therefore be fully transferable to any legal regime on unilateral acts which may be established.

173. The acts considered were addressed to other States; however, in the case of the *Nuclear Tests* case, negative security guarantees, the Truman Proclamation and the waiver of claims to the West Bank territories, such acts were addressed to the international community. It might also be said that the statements concerning negative security guarantees were formulated *erga omnes*, within the framework of international bodies and in the context of the Treaty on the Non-Proliferation of Nuclear Weapons.

174. It may also be concluded that the act of the State can be addressed not only to another State but to other entities, as in the case of Jordan's act and even the declarations of the Swiss Federation — subjects of international law, in any case.

175. In most cases, these acts have a single origin; in others, however, they are compound, not single acts. This means that in some cases, the act is formulated through a declaration made by a person who is in principle competent to do so, while in others, it is formulated through several declarations which jointly give rise to its overall content. This is usually highly relevant, especially for the purposes of interpreting a unilateral act, its content and the subjective factors associated with the consent of the State formulating the act to be bound by it.

176. A declaration may consist of a single act, as in the case of the Ihlen Declaration, the note from Colombia, the Egyptian declaration, the Truman Proclamation and the protest notes from the Russian Federation. In other cases the act consists of several declarations, as with the declarations by the French authorities concerning the *Nuclear Tests* case. And to some extent, although, as stated earlier, they were not identical in content, the declarations of various Swiss officials constitute a single unilateral act.

177. Some cases involve diplomatic notes, as with Colombia and the protest notes from the Russian Federation; a declaration, as with the French authorities and the nuclear Powers; a presidential proclamation; an official speech, such as that of the

King of Jordan and even statements made at meetings of international bodies; and official communications, such as the communiqué from the Swiss Federal Political Department.

178. The acts and declarations considered were formulated on behalf of the State by different authorities and individuals: in the case of the Colombian note and the Norwegian declaration of 22 July 1991, by the Ministers for Foreign Affairs; in the case of the Truman Proclamation, by a head of State; in the case of the Jordanian declaration, by the monarch (head of State); in the case of the Egyptian declaration, by the executive branch; and in the case of the Russian Federation protests, by the Ministry of Foreign Affairs.

179. In the case of the most-favoured-nation clause, the act is formulated by a local authority of the Canton of Geneva and is later confirmed by the Federal Government. This might lead us to consider the possibility, already raised in previous reports, that other persons might be authorized to formulate an act and commit the State on behalf of which they are acting if such a personal capacity can be inferred from practice. In the case of the Swiss declarations, a delegate to a negotiating process formulated the act initially, although it would later be confirmed by the Federal Political Department; this does not provide absolute certainty with respect to such capacity, but rather corroborates or confirms it.

180. This issue of authorized persons has an important parallel in the Vienna treaty regime. Thus, the preceding remarks concerning the capacity of the head of State, the head of Government and the Minister for Foreign Affairs are valid in determining the persons authorized in the first instance to act at the international level and commit the State through the formulation of a unilateral act.

181. This assertion, however, does not necessarily lead to the application mutatis mutandis of the 1969 Vienna Convention on the Law of Treaties. Unilateral acts are formulated in a particular manner; it would therefore seem that the rules governing their formulation should be more flexible, although those relating to their interpretation may be considered more strictly. In addition to the persons authorized under international law to act and commit the State which they represent at the international level, as recognized in the 1969 Vienna Convention, there may be other persons who are empowered to act in a similar manner if the addressee considers that such a person is, in effect, authorized to do so. This reflects the basis for consideration of the topic: legal security and mutual confidence in international relations.

182. In every case — with the exception of the Truman Proclamation, which is not part of specific negotiations — we are dealing with declarations linked in some way to negotiations on a specific issue, such as the declarations made by France, the nuclear Powers and the King of Jordan; the Colombian note of 1952; the protest notes by the Russian Federation; and the acts of Swiss officials in connection with the granting of most-favoured-nation status.

183. Some of these acts are clearly unilateral, such as the Russian Federation's protests and the French statements on the nuclear tests, while others might be considered differently, such as the Colombian Government's note of 22 November 1952 and the oral statement made by the Minister for Foreign Affairs of Norway on 22 July 1919, which may have elements more closely related to the conventional framework.

184. Colombia's act might be considered in various ways. First, it might be viewed in the context of bilateral relations and thus simply the result of negotiations between two countries. In that regard, we should note the terms of Venezuela's reply: "My Government fully agrees with the terms of Your Excellency's note".

185. This note might also constitute a genuine unilateral act which produces effects at the time of its formulation, as was clear to Venezuela. This means that, as the International Court of Justice held in the *Nuclear Tests* case, the act would produce effects without the need for a reply from the Government of Venezuela. The origin of the act and its legal effects came into being at the time Venezuela was notified, regardless of its reaction. As we have seen, different opinions, including that of the Colombian Government, were presented during the proceedings in the Council of State.

186. The Permanent Court of International Justice considered the Ihlen Declaration to be unilateral, but some scholars see it as part of an agreement between two countries.

187. The Truman Proclamation and the statements made by the French authorities concerning the suspension of nuclear tests might be viewed as unilateral *stricto sensu* since they have been considered to produce legal effects without the need for a reaction from the addressee(s).

188. Furthermore, some unilateral declarations may not be considered as having a strictly legal character; this is true, for example, of the statements on negative security guarantees made by the nuclear Powers. These take the form of unilateral declarations, but many believe that they are really political in nature. This view is based on the fact that the authors themselves and the addressees have not been unanimous in considering them to be legally binding declarations. In this regard, it is noteworthy that the Conference on Disarmament has long proposed to develop an agreement on that issue; this suggests that unilateral declarations are not viewed as legal in nature but rather, as has been mentioned, as political declarations of intent.

189. An important question arises with respect to the validity of the act, its invalidation on the grounds that it is contrary to domestic constitutional norms, and the possibility of its confirmation through subsequent acts. The capacity and competence of the organ, two questions which are closely linked but of course separate, is another of the most difficult aspects of consideration of the topic.

190. With regard to Colombia's note of 22 November 1952, for example, the question of the validity of the act might be raised since boundary issues must be submitted to Congress for approval. Despite the official's unquestionable capacity, the specific case, which concerns boundaries and therefore territorial integrity, might require such approval; this relates to the organ's competence to formulate a unilateral legal act.

191. In the case of the public declaration by the King of Jordan, we are dealing with an act prohibited under domestic law. In this particular case, it might be concluded *that the act was confirmed by the Jordanian Government's subsequent acts, which* would preclude the possibility of its invalidation.

192. In both cases, there appears to have been tacit confirmation of the act, in the first case through the Government's attitude and, in the second, through the promulgation of several laws.

193. Consideration of the acts with which we are concerned involves only acts formulated by States and therefore excludes those of international organizations and those which may be formulated by other subjects of international law. However, acts formulated by a State and addressed to an international organization are considered, since it is possible for a State to develop unilateral legal relations with subjects other than a State.

194. Another relevant question which arises during the consideration of such acts is the need to establish the moment at which they produce legal effects. It is assumed that they can produce such effects as from the time of their formulation without the need for their acceptance or for any reaction conveying such acceptance, as has been noted. In the cases considered, it seems difficult to determine the moment at which an act produces legal effects.

195. For example, Colombia's note of 22 November 1952 seems to have produced effects from the time it was formulated, although it might also be considered that, de facto, it did not produce effects until the addressee — in this case, the Ambassador of Venezuela — received it or until receipt of the note was acknowledged. This would, to a great extent, be consistent with consideration of the note as a unilateral act *stricto sensu* or as an act incorporated into treaty relations.

196. The Russian Federation's protests, if considered as such, could be said to have produced an immediate effect inherent in the act of protest — in other words, at the time they were formulated and brought to the addressee's attention. The Russian Federation would be viewed as having been obliged to protest — not to remain silent — when faced with the actions of Turkmenistan and Azerbaijan. In this case, silence could have provided a basis for establishing acquiescence to the claims made by these two countries.

197. It must be stressed that, despite the apparent intention not to produce legal effects, such effects are sometimes produced where the circumstances surrounding the declaration allow the addressee to conclude in good faith that the declaring State was bound by its declaration, as the *Nuclear Tests* case decisions held.

198. As for whether the acts considered were modified or revoked, it will be noted that they have for the most part been maintained as regards their content; the declarations by different Swiss authorities may constitute amendments, but this should not affect their nature as a single unilateral act.

199. In the case of the promise contained in France's statements, the International Court of Justice ruled, on the basis of those statements, that France should conduct itself in accordance with their content. Thus, the declarations gave rise to clear obligations for France.

200. The acts of Jordan and Colombia also have clear, important legal consequences arising from renunciation and recognition, institutions which have been widely recognized and studied in international doctrine.

201. In the case of the statements made by the nuclear-weapon States, we are dealing with guarantees which may also produce legal effects if is concluded that these declarations are legal and therefore binding on these countries in that respect. This position has been defended by various States before the International Court of Justice; however, the position taken by the States which formulated the declarations,

and their conditional nature, make it impossible to state that they are mandatory in the absolute sense.

202. Only in the cases concerning the conduct of Cambodia and Thailand, the *Temple of Preah Vihar* case, the Ihlen declaration and France's statements in the context of the *Nuclear Tests* case have the actions in question been reviewed by an international court. Reference was made to the Truman Proclamation in one case considered by the Court, the *North Sea Continental Shelf* case.

203. Lastly, some comments will be made concerning the conduct of Thailand and Cambodia, which was considered by the International Court of Justice in the *Temple of Preah Vihar* case. In that connection it should be noted that, without constituting unilateral acts within the strict meaning of the term in which the Commission is interested, such conduct may produce relevant legal effects as the Court found in this case.

204. The *Temple of Preah Vihar* case shows the extremely close relationship between the various forms of State conduct: estoppel, silence and acquiescence. A similar relationship may exist between the effects of the conduct of parties to a treaty. Silence and acquiescence formed the basis of the relations between the parties during the proceedings.

205. In a case such as this the relevant issue is not the formulation of a unilateral act, but rather the silence, the passage of time, which may give rise to the assumption that this state of affairs is accepted as such. The absence of protest at this situation and repeated conduct consistent with this state of affairs is what produces, or may produce, legal effects.

206. The concern expressed by the members of the Working Group at its 2003 meeting, when its conclusions mentioned the need for the Special Rapporteur to take conduct into account in his future work, is based on the need to make it clear to States that even their failure to act (especially when they should have expressed opposition) can produce legal effects. There is no question of assimilating such conduct — whether active or passive — to unilateral acts *stricto sensu*, but merely of pointing out its implications.

207. This report may serve as a basis for progress in our work on the topic, despite its complexity. As suggested in the Sixth Committee, the Commission might consider adopting a definition of unilateral acts, perhaps accompanied by a "without prejudice" clause concerning the unilateral conduct of States, which, while important and capable of producing legal effects similar to unilateral acts, is different in nature.

208. After this year's discussion, the Commission might also consider some of the draft articles already referred to the Drafting Committee, particularly those involving issues raised in the preceding paragraphs, separately from the study of practice.

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# Tenth report on reservations to treaties

**By Mr. Alain Pellet, Special Rapporteur**

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# I. Validity of reservations

1. The purpose of the second part of this report is to examine the conditions for validity of reservations to treaties and to propose a series of guidelines which will form the third part of the Guide to Practice, following the first part, devoted to definitions, and the second, which is concerned with the procedure for formulation of reservations and interpretive declarations. Next year this part will be supplemented by several draft guidelines regarding the validity of interpretive declarations — which actually pose few problems in this regard.

2. A first problem arises with the very title of this third part: after much hesitation, the Special Rapporteur has decided to revert to the phrase "validity of reservations" to describe the intellectual operation consisting in determining whether a unilateral statement made[1] by a State or an international organization and purporting to exclude or modify the legal effect of certain provisions of the treaty[2] in their application to that State or organization is capable of producing the effects attached in principle to the formulation of a reservation.

3. Faithful to the definition found in article 2, paragraph 1 (d) of the Vienna Conventions, reproduced in draft guideline 1.1 of the Guide to Practice, the Commission has accepted that all unilateral statements meeting this definition constitute reservations. But, as the Commission stated very clearly in its commentary on draft guideline 1.6, "[d]efining is not the same as regulating. [...] a reservation may or may not be permissible, but it remains a reservation if it corresponds to the definition established".[3] "Furthermore, the exact determination of the nature of a statement is a precondition for the application of a particular legal regime, in the first place, for the assessment of its permissibility. It is only once a particular instrument has been defined as a reservation (...) that a decision can be taken as to whether it is permissible or not, its legal scope can be evaluated and its effect can be determined.[4]

4. This language poses a problem. At the outset, the Special Rapporteur had indeed preferred the words "validity" and "invalidity" or "non-validity" to "permissibility" and "impermissibility".[5] This terminology was disputed by Professor D.W. Bowett, who believed that this concept gives rise to confusion between two different questions, the *permissibility* of a reservation and the *opposability* of a reservation (meaning whether it may be invoked against another party).[6] The Commission having used this expression in its report on the work of its

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[1] Given that the mere formulation of a reservation does not allow it to produce the effects intended by its author, the word "formulated" would have been more appropriate (see paras. 13 and 14 below); but the Vienna Conventions use the word "made" and as a matter of principle the Commission does not wish to revisit the Vienna text.

[2] Or of the treaty as a whole with respect to certain specific aspects (see draft guideline 1.1.1).

[3] *Yearbook ... 1999*, vol. II, (part two), para. 2 of the commentary.

[4] Ibid.; pp. 133-134, para. 3 of the commentary. See also the commentary on draft guideline 1.1.1 in *Yearbook ... 1998*, vol. II, part two, para. 3 of the third report, document A/CN.4/491/Add.3, paras. 158 and 179.

[5] In the preliminary outline he prepared on the subject in 1993, the future Special Rapporteur on the topic had used the expression "validity of reservations" (see *Yearbook ... 1993*, vol. II, (part one), p. 249).

[6] ILC/WG/LTPW/93/1/Add.1.

forty-fifth session,[7] the representative of the United Kingdom to the Sixth Committee stated, in 1993:

> "His delegation experienced some unease over the Commission's use of the term 'validity of reservations' in paragraph 428 of its report. While the context indicated what the Commission had in mind, the wording used could be interpreted as presupposing the possibility that a statement conditioning the consent of an adhering State to be bound by a treaty might by some means be held to be a nullity. In fact, article 2 (d) of the Vienna Convention, by referring to a reservation not only as a 'unilateral' statement which 'purported' to achieve an exclusion or modification of treaty terms, but even more so articles 19 et seq., in their careful references to 'formulation' of reservations, made it plain that any such statement was ipso facto a 'reservation', but that its legal effect remained to be determined by the rules which followed. That emerged with great clarity from the Commission's commentary on articles 17 to 19 of the 1962 draft and explained why, in the usage of the Vienna Convention, even the cases expressly prohibited, or those incompatible with the object and purpose of a treaty, were referred to in article 19 as 'reservations', and why article 21 referred to a reservation 'established with regard to another party'."[8]

5. As the Special Rapporteur indicated in his preliminary report, in his mind, "the word 'validity' was fairly neutral and did indeed encompass the question of the opposibility of the reservation which, in his view, is closely linked to the question of the legal regime of objections, even though it does not necessarily depend exclusively on that regime. Moreover, if the word 'permissibility' seems more appropriate, there is no problem in using it. It is in fact more accurate".[9] However, he noted[10] that the objections of both Professor Bowett and the British Government assumed the solution of the doctrinal controversy, central to the question of reservations, between the proponents of "opposability" and those of "permissibility"[11] in favour of this second thesis, of which Sir Derek Bowett is one of the most eminent representatives.[12] Subsequent to these observations, the Commission (and its Special Rapporteur) used the words "admissible" (*licite*) to describe a reservation likely to produce the effects envisaged by the Vienna Conventions, and "inadmissible" (*illicite*) to designate a reservation that could not produce them.

6. However, a new problem arose when:

> "some members pointed out that this word ['impermissible'] was not appropriate in that case: in international law, an internationally wrongful act entails its author's responsibility, and this is plainly not the case of the

[7] *Yearbook ... 1993*, vol. II (part two), para. 428; the Commission specified that the question of "the validity of reservations" "encompasses that of the conditions for the lawfulness of reservations and that of their applicability to another State".

[8] A/C.6/48/SR.24, para. 42.

[9] Preliminary report, A/CN.4/470, para. 99.

[10] Ibid., para. 100.

[11] Ibid., paras. 101 to 104.

[12] See Derek W. Bowett, "Reservations to Non-Restricted Multilateral Treaties", *British Yearbook of International Law 1976-1977*, p. 67 to 92.

formulation of reservations which are contrary to the provisions of the treaty to which they relate or incompatible with its object and purpose".[13]

Consequently, in 2002, the Commission decided to leave the matter open pending the examination of the effect of such reservations.[14]

7. On reflection, however, it is not appropriate for the Commission to wait until it has studied the effects of reservations before deciding on this question of terminology:

- In the first place, the term "permissible" used in the English text of the draft guidelines adopted to date and their commentaries implies that it is exclusively a question of permissibility and not of opposability;

- In the second place, the word "admissible", for its part, implies that the formulation of reservations while ignoring the provisions of article 19 of the Vienna Conventions engages the responsibility of the reserving State or international organization, which is certainly not the case.[15]

8. In any event, and this is the only point that matters at this stage, the word "validity" has the advantage of being neutral and of not prejudging either the response the Commission will make to the dispute between opposability and permissibility, or the question of the effects of formulating a reservation contrary to the provisions of article 19. Hence, on the one hand, there is no reason not to consider the question of the validity of reservations and, on the other, the Commission should, as a result, replace the words "admissible" (*licite*) and "inadmissible" (*illicite*) by the words "valid" and "invalid" in draft guidelines 1.6 (Scope of definitions) and 2.1.8 ("Procedure in case of manifestly [impermissible] reservations").[16]

9. With the benefit of this preliminary remark, this report will proceed to study in as much depth as possible the validity of reservations in the light of article 19 of the Conventions of 1969 and 1986, which undoubtedly constitutes the cornerstone of the Vienna regime,[17] following the general outline:

- Starting from the principle that there exists a presumption of validity of reservations (A),

- This provision spells out the cases in which a reservation is prohibited either expressly or implicity (B), before stating

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[13] Commentary on draft guideline 2.1.8 ("Procedure in case of manifestly [impermissible] reservations"), *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), para. 7, p. 114.

[14] Ibid.

[15] On this point, see A/CN.4/558/Add.2, paras. 190 and 191.

[16] Guideline 1.6 should read as follows: "The definitions of unilateral statements included in the present chapter of the Guide to Practice are without prejudice to the *validity* [not 'the permissibility'] and effects of such statements under the rules applicable to them"; and guideline 2.1.8 should be entitled "Procedure in case of manifestly *invalid* reservations" [not "*impermissible*"]. During the final "cleanup" of the Guide to Practice, the commentaries should also be modified in the same way.

[17] See Jean-Marie Ruda, "Reservations to Treaties", *Recueil des cours de l'Académie de droit international*, 1975-III, vol. 146, p. 180.

- The general requirement of the compatibility of reservations with the object and purpose of the treaty (C);

- Lastly, a general study will need to be made of the modalities for the application of these principles (D).

## A. Presumption of validity of reservations

10. By providing that, when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, "[a] State or an international organization *may* (...) formulate a reservation", albeit under certain conditions, article 19 of the 1986 Vienna Convention sets out, as did the same provision of the 1969 Convention before it, "the general principle that the formulation of reservations is permitted ...".[18] This is an essential element of the "flexible system" stemming from the advisory opinion of the International Court of Justice of 1951,[19] and it is no exaggeration to say that, in this respect, it reverses the traditional presumption resulting from the system of unanimity,[20] the stated aim being to facilitate the widest possible participation in and, ultimately, the universality of treaties.

11. In this regard, the text of article 19, which resulted directly from Waldock's proposals, takes the opposite view from the drafts prepared by the Special Rapporteurs on the law of treaties which preceded it, all of which started from the opposite assumption, expressing in negative or restrictive terms the principle that a reservation may *only* be formulated (or "made"[21]) *if* certain conditions are met.[22]

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[18] Commentary to draft article 18 adopted on first reading in 1962, *Yearbook ... 1962*, vol. II, p. 180, para. 15; see also the commentary to draft article 16 adopted on second reading, *Yearbook ... 1966*, vol. II, p. 207, para. 17. For the 1986 Convention, see the commentaries to draft articles 19 (Case of treaties between international organizations) adopted in 1977, *Yearbook ... 1977*, vol. II, p. 106, para. 1, and 19 bis (Case of treaties between States and one or more international organizations or between international organizations and one or more States), *ibid.*, p. 108, para. 3.

[19] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1951*, p. 15. See the preliminary report on reservations (A/CN.4/470), paras. 36-46.

[20] This concept, which had undoubtedly become the customary norm in the period between the wars (see the joint dissenting opinion of Judges Guerrero, McNair, Read and Hsu Mo appended to the aforementioned advisory opinion, *I.C.J. Reports 1951*, pp. 34-35), significantly restricted the freedom to make reservations: this was possible only if all the other parties to the treaty accepted the reservation, otherwise the author remained outside the treaty. In its comments on draft article 18, adopted by the Commission in 1962, Japan proposed reverting to the opposite presumption (see the fourth report on the law of treaties by Sir Humphrey Waldock, *Yearbook ... 1965*, vol. II, p. 496).

[21] On this issue, see below, paras. 13 and 14.

[22] See, for example, draft articles 10, para. 1, of the 1950 draft by J. L. Brierly (A/CN.4/23, English text in *Yearbook ... 1950*, vol. II, p. 238), nine of the drafts by Hersch Lauterpacht (first report (A/CN.4/63), reproduced in English in *Yearbook ... 1953*, p. 91; second report (A/CN.4/87), English text in *Yearbook ... 1954*, vol. II, p. 131) and 39, para. 1, of the draft by G. G. Fitzmaurice (*Yearbook ... 1956*, vol. II, p. 118). See the comments by Pierre-Henri Imbert, *Les réserves aux traités multilatéraux*, Pedone, Paris, 1979, p. 88 and 89.

Sir Humphrey, for his part,[23] presents the principle as the "power to formulate, that is, to *propose*, a reservation", which a State has "in virtue of its sovereignty".[24]

12. However, this power is not unlimited:

- In the first place, it is limited in time, since a reservation may only be formulated "when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty";[25]

- In the second place, the formulation of reservations may be incompatible with the object of some treaties, either because they are limited to a small group of States — a situation that is taken into account in article 20, paragraph 2, of the Convention, which reverts to the system of unanimity where such instruments are concerned[26] — or, in the case of global instruments, because the parties intend to make the integrity of the treaty take precedence over its universality or, at any rate, to limit the power of States to formulate reservations; on this issue, as on all others, the Vienna Convention is only intended to be residuary in nature and there is nothing to prevent the negotiators from inserting in the treaty "reservations clauses" that limit or modify the freedom set out as a principle in article 19.[27]

Thus, it is probably excessive to speak of a "right to reservations", even though the Convention undoubtedly proceeds from the principle that there is a presumption to that effect.

13. This is the meaning of the very title of article 19 ("*Formulation* of reservations"), which is confirmed by the *chapeau* of this provision: "A State may (...) *formulate* a reservation *unless* ...". Certainly, by using the verb "may", the introductory clause of article 19 recognizes that States have a right; but it is only the right to "formulate" reservations.[28]

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[23] "A State is free, when signing, ratifying, acceding to or accepting a treaty, to formulate a reservation (...) unless: ..." (*Yearbook ... 1962*, vol. II, article 17, para. 1 (a), p. 60).

[24] Commentary on article 17, ibid., p. 65, para. 9; the italics are in the text.

[25] See below, para. 19.

[26] "When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties."

[27] With regard to the residuary, voluntary nature of the Vienna regime, see the preliminary report on reservations (A/CN.4/470), para. 123; the second report on reservations (A/CN.4/477 and Add.1), paras. 26, 123, 133 and 163; the third report (A/CN.4/491 and Add.1-6), para. 139; or the fifth report (A/CN.4/508 and Add.1-4), para. 290; see also: Anthony Aust, *Modern Treaty Law and Practice*, Cambridge University Press, 2000, p. 124 to 126; John King Gamble, Jr., "Reservations to multilateral treaties: a macroscopic view of State practice", *American Journal of International Law*, 1980, p. 383 to 391; P.-H. Imbert, op. cit., note 22, p. 162 to 230; Lord McNair, *The Law of Treaties*, Clarendon Press, Oxford, 1961, p. 169 to 173; Jörg Polakiewicz, *Treaty-Making in the Council of Europe*, Council of Europe, Strasbourg, 1999, p. 85 to 90 and 101 to 104; Rosa Riquelme Cortado, *Las reservas a los tratados — Formulación y ambigüedades del regimen de Viena*, Universidad de Murcia, 2004, p. 89 to 136.

[28] P.-H. Imbert, op. cit., note 22, p. 83; see also Paul Reuter, *Introduction au droit des traités*, PUF, Paris, 3rd ed., revised and expanded by Philippe Cahier, 1995, p. 75; or R. Riquelme Cortado, op. cit., note 27, p. 84. It may also be noted that a proposal by Briggs to replace the word "free" in Waldock's draft (see above note 23) with the words "legally entitled" (*Yearbook ... 1962*, vol. I, 651st meeting, 25 May 1962, p. 140, para. 22) was not accepted, nor was an amendment along

14. The words "formulate" and "formulation" were carefully chosen. They signify that, while it is up to the State intending to attach a reservation to its expression of consent to be bound to indicate how it means to modify its participation in the treaty,[29] this formulation is not sufficient of itself: the reservation is not "made", it does not take effect, merely by virtue of such a statement. For this reason, an amendment by China seeking to replace the words "formulate a reservation" with the words "make reservations"[30] was rejected by the Drafting Committee of the Vienna Conference.[31] As Waldock noted, "there is an inherent ambiguity in saying (...) that a State may '*make*' a reservation; for the very question at issue is whether a reservation *formulated* by one State can be held to have been effectively 'made' unless and until it has been assented to by the other interested States".[32] Now, not only is a reservation only "established"[33] if certain procedural conditions — admittedly, not very restrictive ones[34] — are met, but it must also comply with the substantive conditions set forth in the three subparagraphs of article 19 itself, as the word "unless" clearly demonstrates.[35]

15. According to some authors, the terminology used in this provision is not consistent in this regard since if the treaty permits certain reservations (art. 19, para. (b)), they do not need to be accepted by the other States ... they are thus "made" from the moment of their formulation by the reserving State.[36] That being the case, while subparagraph (b) correctly states that such reservations "may be *made*", the

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the same lines proposed by the Union of Soviet Socialist Republics at the Vienna Conference (A/CONF.39/C.1/L.115, *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969, Documents of the Conference* (A/CONF.39/11/Add.2), p. 133, para. 175. The current wording ("A State (...) may formulate a reservation unless ...") was adopted by the Commission's Drafting Committee (*Yearbook ... 1962*, vol. I, 663rd meeting, 18 June 1962, p. 221, para. 3), then by the Commission in plenary (ibid., vol. II, pp. 175-176, art. 18, para. 1) in 1962. No amendments were made in 1966, other than the replacement of the words "*Tout État*" [in the French text] with the words "*Un État*" (see *Yearbook ... 1965*, vol. I, 813th meeting, 29 June 1965, p. 287, para. 1 (text adopted by the Drafting Committee), and *Yearbook ... 1966*, vol. II, p. 202 (article 16 adopted on second reading)).

[29] Cf. D. W. Greig, "Reservations: equity as a balancing factor?", *Australian Yearbook of International Law*, 1995, p. 22.

[30] A/CONF.39/C.1/L.161 (see *Documents of the Conference* (A/CONF.39/11/Add.2), cited above in note 28, p. 133 and 134, para. 177).

[31] See *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March-24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11), Committee of the Whole, 23rd meeting, 11 April 1968, p. 121, para. 2 (explanations by China), and 24th meeting, 16 April 1968, p. 126, para. 13 (statement by the Expert Consultant Sir Humphrey Waldock).

[32] First report (A/CN.4/144) cited above in note 23, p. 62, para. 1, of the commentary on draft articles 17 to 19.

[33] See the *chapeau* of article 21: "A reservation established with regard to another party in accordance with articles 19, 20 and 23 ...".

[34] See articles 20, paras. 3-5, 21, para. 1, and 23, and draft guidelines 2.1 to 2.2.3. See also Massimo Coccia, "Reservations to multilateral treaties on human rights", *California Western International Law Journal*, 1985, p. 28.

[35] "This article states the general principle that the formulation of reservations is permitted except in three cases" (*Yearbook ... 1966*, vol. II, p. 207, commentary to article 16, para. 17); the use of the word "*faire*" in the French text of the commentary is open to criticism, but it is probably a translation error, rather than a deliberate choice — *contra*: P.-H. Imbert, op. cit., note 22, p. 90. Moreover, the English text of the commentary is correct.

[36] P.-H. Imbert, op. cit., note 22, p. 84 and 85.

*chapeau* of article 19 is misleading for it implies that they, too, are merely "formulated" by their author.[37] Yet this is a quarrel over nothing:[38] subparagraph (b) does not refer to those reservations that are established (or made) simply by virtue of being formulated, but rather to those that are not permitted by the treaty. As in the situation in subparagraph (a), such reservations cannot be formulated: in one case (subparagraph (a)), the prohibition is explicit; in the other (subparagraph (b)), it is implied.

16. The principle of freedom to formulate reservations undoubtedly constitutes a key element of the Vienna regime and the question arises as to whether it should be the subject of a separate draft guideline, which could read as follows:

> "*3.1 [Freedom to formulate a reservation] [Presumption of validity of reservations]*
>
> *A State or an international organization may, at the time of signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, formulate a reservation.*"

17. However, not without some hesitation, the Special Rapporteur does not propose that the Commission should proceed in this manner. Such a guideline would no doubt have the merit of highlighting this key principle of the Vienna regime while not departing from the language of the 1969 and 1986 Conventions, since the wording used above is precisely that of the *chapeau* of article 19. Nevertheless, as a general rule, the Commission has avoided splitting up provisions from individual articles of the Vienna Conventions and reproducing them in separate draft guidelines.[39] More fundamentally, the principle of freedom to formulate reservations (and, by extension, the presumption of their validity) cannot be separated from the exceptions to this principle.

18. In conformity with the Commission's practice to date, and in the absence of any strong reason for doing otherwise, it seems preferable to include the entire text of article 19 at the beginning of the third part of the Guide to Practice, devoted to

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[37] See also J. M. Ruda, op. cit., note 17, p. 179 and 180, and the far more restrained criticism by Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, T.M.C. Asser Instituut, Swedish Institute of International Law, Studies in International Law, vol. 5, The Hague, p. 111 and 112.

[38] One may, however, question the use of the verbs "formulate" and "make" in article 23, paragraph 2; it is not consistent to state, at the end of this provision, that, if a reservation formulated when signing [a treaty] is confirmed at the time of the expression of consent to be bound, "the reservation shall be considered as having been *made* on the date of its confirmation". In elaborating the Guide to Practice on reservations, the Commission has endeavoured to adopt consistent vocabulary in this regard (the criticisms directed at it by R. Riquelme Cortado — op. cit., note 27, p. 85 — appear to be based on a translation error in the Spanish text).

[39] Cf. draft guidelines 1.1 (Definition of reservations), 2.2.1 (Formal confirmation of reservations formulated when signing a treaty) or 2.5.1 (Withdrawal of reservations), which reproduce the text of articles 2, para. 1 (d), 23, para. 2, and 22, para. 1, respectively, of the 1986 Vienna Convention. Nevertheless, the Commission has not followed this general rule when the structure of the Guide to Practice has necessitated the division of the various elements of individual provisions of the Convention among several guidelines (for example, the rules set forth in article 23 concerning the procedure regarding reservations, acceptance of and objection to a reservation are divided among several draft guidelines), but there is no reason for doing so in this instance. Note: the Commission prefers to base itself on the 1986 text, which is more complete than the 1969 one.

validity of reservations, and to give further information and clarifications, such as to provide useful guidance for the practice of States, in the commentary and in additional draft guidelines.

19. The only question that arises in this regard concerns the repetition in the *chapeau* of article 19 of the two Vienna Conventions of the different moments (or "instances" to reproduce the terminology used in draft guideline 1.1.2[40]) "[at] which a reservation may be formulated". Indeed, as is emphasized above,[41] article 19 reproduces the temporal limitations included in the very definition of reservations given in article 2, paragraph 1 (d), of the Vienna Conventions.[42] There is no doubt that this repetition is superfluous, as was stressed by Denmark during the consideration of the draft articles on the law of treaties adopted in 1962.[43] However, the Commission did not think it necessary to correct this anomaly when the final draft was adopted in 1966, and this repetition is not a sufficiently serious drawback to merit rewriting the Vienna Convention, which, moreover, has managed very well this drawback notwithstanding.

20. This being the case, it seems reasonable to reproduce in a draft guideline 3.1, which could be entitled "Freedom to formulate reservations", the text of article 19 of the 1986 Vienna Convention.

> "*3.1 Freedom to formulate reservations*
>
> *A State or an international organization may, at the time of signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, formulate a reservation unless:*
>
> *(a) The reservation is prohibited by the treaty;*
>
> *(b) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or*
>
> *(c) In cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.*"

21. As the wording of subparagraph (c) of this provision implies, the three conditions for the validity of reservations stipulated in article 19 are not all of the same order. Subparagraphs (a) and (b) envisage the[44] situations in which a reservation is prohibited by the treaty, either expressly or impliedly, whereas subparagraph (c) concerns the cases in which a reservation is precluded despite the silence of the treaty. It will be helpful to consider the two situations separately.

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[40] *Yearbook* ... 1998, vol. II, part two, p. 99.

[41] Para. 12.

[42] See draft guidelines 1.1 (Definition of reservations) and 1.1.2 (Cases in which a reservation may be formulated) and the commentaries thereto, *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), p. 196 to 199 and 203 to 206.

[43] See the fourth report of Sir Humphrey Waldock (A/CN.4/177), cited above in note 20, p. 46.

[44] Or, more precisely, "*some* situations" because they are not all covered (see below, paras. 31-32).

## B. Reservations prohibited by the treaty

22. According to Paul Reuter, the situations envisaged in subparagraphs (a) and (b) of article 19 constitute very simple cases.[45] Nothing could be less certain. It is true that these provisions refer to cases where the treaty to which a State or an international organization wishes to make a reservation contains a special clause prohibiting or permitting the formulation of reservations. But, aside from the fact that not all possibilities are explicitly covered, delicate problems can arise regarding the exact scope of a clause prohibiting reservations (1) and the effects of a reservation formulated despite that prohibition (2).

### 1. The scope of clauses prohibiting reservations

23. In draft article 17, paragraph 1 (a), which he submitted to the Commission in 1962, Waldock distinguished three possibilities:

- Reservations expressly "prohibited by the terms of the treaty or excluded by the nature of the treaty or by the established usage of an international organization";
- Those not falling under a clause restricting the making of reservations or
- [A clause] authorizing certain reservations.[46]

What these three cases had in common was that, unlike reservations incompatible with the object and purpose of the treaty,[47] "when a reservation is formulated that is not prohibited by the treaty, the other States are called upon to indicate whether they accept or reject it but, when the reservation is one prohibited by the treaty, they have no need to do so, for they have already expressed their objection to it in the treaty itself".[48]

24. Even though it was taken up again, in a slightly different form, by the Commission,[49] this wording was unnecessarily complicated and, at the rather general level at which the authors of the Convention intended to operate, there was no point in drawing a distinction between the first two possibilities identified by the Special Rapporteur.[50] In draft article 18, paragraph 2, which he proposed in 1965 in

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[45] Paul Reuter, "Solidarité et divisibilité des engagements conventionnels" in *International Law at a Time of Perplexity — Essays in Honour of Shabtai Rosenne*, Nijhoff, Dordrecht, 1999, p. 625 (also reproduced in P. Reuter, *Le développement de l'ordre juridique international — Écrits de droit international*, Economica, Paris, 1999, p. 363).

[46] First report, A/CN.4/144, cited above in note 23, p. 60.

[47] Situation envisaged in paragraph 2 of draft article 17 but in a rather different form than in the current text (see A/CN.4/558/Add.1).

[48] Sir Humphrey Waldock, First report, A/CN.4/144, cited above in note 23, p. 74, para. 9 of the commentary.

[49] Draft article 18, para. 1 (b), (c) and (d), *Yearbook ... 1962*, vol. II, p. 176 (see the commentary on this paragraph, p. 180, para. 15).

[50] On the contrary, during the discussion of the draft, Briggs considered that "the distinction was between the case set out in subparagraph (a), where all reservations were prohibited, and the case set out in subparagraphs (b) and (c), where only some reservations were either expressly prohibited or impliedly excluded". (*Yearbook ... 1962*, vol. I, 663rd meeting, 18 June 1962, p. 222, para. 12; against: Waldock, ibid., p. 247, para. 32; as the example of article 12 of the 1958 Convention on the Limits of the Continental Shelf (para. 41 below) indicates, this comment is highly relevant.

the light of the observations by Governments, he restricted himself to distinguishing reservations expressly prohibited by the treaty (or "by the established rules of an international organization")[51] from those implicitly prohibited as a result of the authorization of specified reservations by the treaty.[52] This dual distinction is found in a more refined form[53] in article 19, subparagraphs (a) and (b) of the Convention, without any distinction being made as to whether the treaty prohibits, or fully or partially authorizes reservations.[54]

### (a) Express prohibition of reservations

25. According to Professor Tomuschat, the prohibition in subparagraph (a), as it is drafted, should be understood as covering both express prohibitions and implicit

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[51] Although the principle had not been disputed at the time of the discussion in plenary meeting in 1965 (but had been disputed by Lachs in 1962 (see *Yearbook* ... 1962, vol. I, 651st meeting, 25 May 1962, p. 142, para. 53) and had been retained in the text adopted during the first part of the seventeenth session (see *Yearbook* ... 1965, vol. II, p. 174) this indication disappeared without explanation from draft article 16 as finally adopted by the Commission in 1966 following the "final cleanup" by the Drafting Committee (see *Yearbook* ... 1966, vol. I, 887th meeting, 11 July 1966, para. 91). The deletion of this phrase should be seen in the context of the general safeguards clause concerning "constitutions of international organizations and treaties adopted within an international organization" appearing in article 5 of the Convention and adopted the same day in its final form by the Commission (ibid., para. 79). In practice, it is very unusual to allow reservations to be formulated to the constitution of an international organization (see Maurice H. Mendelson, "Reservations to the Constitutions of International Organizations", BYBIL 1971, p. 131 to 171). As for treaties concluded within the context of international organizations, the best example of (purported) exclusion of reservations is that of the International Labour Organization, whose consistent practice is not to accept the deposit of instruments of ratification of international labour conventions when accompanied with reservations (see the Memorandum submitted by the Director of the International Labour Office to the Council of the League of Nations on the admissibility of reservations to general conventions, *Official Journal* of the League of Nations, 1927, p. 882, or the memorandum submitted by the International Labour Organization to the International Court of Justice in 1951 in the case concerning the *Reservations to the Convention on Genocide, in ICJ Memoires, Pleadings and Documents*, 1951, p. 227 and 228, or the statement of Wilfred Jenks, Legal Adviser of the International Labour Organization, during the oral pleadings on that case, ibid., p. 234); for a discussion and critique of this position, see the commentary on draft guideline 1.1.8 (Reservations made under exclusionary clauses) of the Guide to Practice, in the *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), pp. 230-241, paras. 3 to 5.

[52] Fourth report, A/CN.4/177, cited above in note 20.

[53] On the editorial changes made by the Commission, see the debate on draft article 18 (*Yearbook* ... 1965, vol. I, especially the 797th and 798th meetings, 7 and 9 June 1965, p. 163-173) and the text adopted by the Drafting Committee (ibid., 813th meeting, 29 June 1965, p. 287, para. 1) and its discussion (ibid., p. 287-289). The final text of article 16 (a) and (b) adopted on second reading by the Commission read as follows: "A State may (...) formulate a reservation unless: (a) The reservation is prohibited by the treaty; (b) The treaty authorizes specified reservations which do not include the reservation in question" (*Yearbook* ... 1966, vol. II, p. 202) see also note 83 below.

[54] The "alternative drafts" proposed *de lege ferenda* in 1953 in the first report submitted by Hersch Lauterpacht all referred to treaties that "[do] not prohibit or restrict the faculty of making reservations" (first report, A/CN.4/63, cited above in note 22, p. 115-116, *Yearbook* ... 1953, p. 91-92).

prohibitions of reservations.[55] Some justification for this interpretation can be found in the *travaux préparatoires* for this provision:

- In the original wording, proposed by Waldock in 1962,[56] it was specified that the provision concerned reservations that were "expressly prohibited", a clarification that was abandoned in 1965 without explanation by the Special Rapporteur and with little light being shed by the discussions in the Commission on this matter;[57]

- In the commentary on draft article 16 adopted on second reading in 1965, the Commission in effect seems to place on the same footing "reservations expressly or implicitly prohibited by the provisions of the treaty".[58]

26. This interpretation, however, is open to discussion. The idea that certain treaties could "by their nature", exclude reservations was discarded by the Commission in 1962, when it rejected the proposal along those lines made by Waldock.[59] It is therefore hard to see what prohibitions could derive "implicitly" from a treaty, except in the cases covered by subparagraphs (a) and (b)[60] of article 19[61] and it must be recognized that subparagraph (a) concerns only reservations expressly prohibited by the treaty. Moreover, this interpretation is the only one compatible with the great liberalism that pervades all the provisions of the Convention that deal with reservations.

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[55] Christian Tomuschat, "Admissibility and Legal Effects of Reservations to Multilateral Treaties. Comments on Article 16 and 17 of the International Law Commission's Draft Articles on the Law of Treaties", Z.a.ö.R.V., 1967, p. 469.

[56] See para. 23 above.

[57] See, however, the statement by Yasseen, *Yearbook* ... 1965, vol. I, 797th meeting, 8 June 1965, p. 149, para. 19 "the words 'the terms of' (*expressément*) could be deleted and it could read simply: '[unless] the making of reservations is prohibited by the treaty ...' For it was enough that the treaty was not silent on the subject; it did not matter whether it referred to reservations implicitly or expressly" — but he was referring to the 1962 text.

[58] Like, moreover, "those expressly or impliedly authorized", *Yearbook* ... 1966, vol. II, p. 205, para. 10 of the commentary; see also p. 207, para. 17. In the same spirit, article 19, para. 1 (a) of the draft articles on the law of treaties concluded between States and international organizations or between two or more international organizations adopted by the Commission in 1981 placed on equal footing cases where reservations are prohibited by treaties and those where it is "otherwise established that the negotiating States and negotiating organizations were agreed that the reservation is prohibited" *Yearbook* ... 1981, vol. II, Part Two, p. 137.

[59] See para. 24 above. The Special Rapporteur indicated that in drafting this clause, "what he had had in mind was the Charter of the United Nations which, by its nature, was not open to reservations" (*Yearbook* ... 1962, vol. I, 651st meeting, 25 May 1962, p. 143, para. 60). This exception is covered by the safeguard clause of article 5 of the Convention (see note 60 below). The words "nature of the treaty" drew little attention during the discussion (Castrén, however, found the expression imprecise — ibid., 652nd meeting, 28 May 1962, p. 166, para. 28; see also Verdross, ibid., para. 35); it was deleted by the Drafting Committee (ibid., 663rd meeting, 18 June 1962, p. 221, para. 3).

[60] The amendments of Spain (A/CONF.39/C.1/L.147) and of the United States of America and Colombia (A/CONF.39/C.1/L.126 and Add.1) aimed at reintroducing the idea of the "nature" of the treaty in subparagraph (c) were withdrawn by their authors or rejected by the Drafting Committee (see the reaction of the United States, *Official Records of the United Nations Conference on the Law of Treaties, Second Session, Vienna, 9 April to 22 May 1969*, Summary records of plenary meetings and meetings of the plenary Committee (A/CONF.39/11/Add.1, p. 37).

[61] This is also the final conclusion arrived at by C. Tomuschat (op. cit., note 55, p. 471).

27. There is no problem — other than determining whether or not the declaration in question constitutes a reservation[62] — if the prohibition is clear and precise, in particular when it is a general prohibition, on the understanding, however, that there are relatively few such examples[63] even if some are famous, such as that in article 1 of the Covenant of the League of Nations:

> "The original Members of the League shall be those of the Signatories (...) as shall accede without reservation to this Covenant ..."[64]

Likewise, article 120 of the 1998 Rome Statute of the International Criminal Court states:

> "No reservations may be made to this Statute".[65]

And similarly, article 26, paragraph 1, the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal states:

> "No reservation or exception may be made to this Convention".[66]

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[62] See draft guideline 1.3.1 (Method of implementation of the distinction between reservations and interpretive declarations) and its commentary, *Yearbook ... 1999*, vol. II, second part, p. 107 to 109.

[63] Even in the area of human rights (see P. H. Imbert, "Reservations and Human Rights Conventions", Human Rights Review, 1981, p. 28 or W. A. Schabas, "Reservations to Human Rights Treaties: Time for Innovation and Reform", Canadian Yearbook of International Law, p. 46; see, however, for example, the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of 7 September 1956 (article 9), the Convention against Discrimination in Education of 14 December 1960 (article 9, para. 7), Protocol No. 6 to the European Convention on Human Rights on the abolition of the death penalty of 28 April 1983 (article 4) or the European Convention against Torture of 26 November 1987 (article 21) which all prohibit any reservations to their provisions. Reservation clauses in human rights treaties sometimes refer to the provisions of the Vienna Convention concerning reservations (cf. article 75 of the American Convention on Human Rights) — which conventions containing no reservation clauses do implicitly — or reproduce its provisions (cf. article 28, para. 2 of the 1979 Convention on the Elimination of All Forms of Discrimination against Women or article 51, para. 2, of the 1989 Convention on the Rights of the Child).

[64] It could be maintained that this rule was set aside when the Council of the League recognized the neutrality of Switzerland (in this respect, M. Mendelson, op. cit., note 51, p. 140 and 141).

[65] However straightforward it may seem, this prohibition is not actually totally devoid of ambiguity: the highly regrettable article 124 of the Statute which authorizes "a State on becoming a party [to] declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court" with respect to war crimes, constitutes an exception to the rule stated in article 120, for such declarations amount to reservations (see A. Pellet, "Entry into Force and Amendment of the Statute" in Antonio Cassese, Paola Gaeta and John R. W. Jones, eds., *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, vol. I, p. 157; see also the European Convention on the Service Abroad of Documents relating to Administrative Matters, whose article 21 prohibits reservations, while several other provisions authorize certain reservations. For other examples, see Sia Spiliopoulou Åkermark, "Reservations Clauses in Treaties Concluded within the Council of Europe", *I C L Q*. 1999, p. 493 and 494; P. Daillier and A. Pellet, *Droit international public (Nguyen Quoc Dinh)*, L.G.D.J. Paris, 7th edition, 2002, p. 181; P. H. Imbert, op. cit., note 22, p 165 and 166; F. Horn, op. cit., note 37, p.113; R. Riquelme Cortado, op. cit., note 27, p. 105 to 108; W. A. Schabas, op. cit., note 63, p. 46.

[66] For a very detailed commentary, see Alessandro Fodella, "The Declarations of States Parties to the Basel Convention" in Tullio Treves ed., "Six Studies on Reservations", *Communicazioni e Studi*, vol. XXII, 2002, p. 111 to 148; article 26, paragraph 2, authorizes States parties to make "declarations or statements, however phrased or named, with a view, inter alia, to the

28. Sometimes, however, the prohibition is more ambiguous. Thus, in accordance with paragraph 14 of the Final Act of the 1961 Geneva Conference which adopted the European Convention on International Commercial Arbitration, "the delegations taking part in the negotiation of the Convention (...) declare that their respective countries do not intend to make any reservations to the Convention":[67] not only is it not a categorical prohibition, but this declaration of intention is even made in an instrument separate from the treaty. In a case of this type, it could seem that reservations are not strictly speaking prohibited, but that if a State formulates a reservation, the other Parties must, logically, object to it.

29. More often, the prohibition is partial and relates to one or more specified reservations or one or more categories of reservations. The simplest (but rather rare) situation is that of clauses listing the provisions of the treaty to which reservations are not permitted.[68] This is the case in article 42 of the Convention relating to the Status of Refugees of 28 July 1951[69] or article 26 of the 1972 International Convention for Safe Containers of the International Maritime Organization.

30. The situation where the treaty does not prohibit reservations to specified provisions but excludes certain categories of reservations is more complicated. An example of this type of clause is provided by article 78, paragraph 3, of the International Sugar Agreement of 1977:

> "Any Government entitled to become a Party to this Agreement may, on signature, ratification, acceptance, approval or accession, make reservations which do not affect the economic functioning of this Agreement [...]".

31. The distinction between reservation clauses of this type and those excluding specific reservations, was made in Sir Humphrey Waldock's draft in 1962.[70] For their part, the Vienna Conventions do not make such distinctions and, despite the uncertainty that prevailed in their *travaux préparatoires*, it should certainly be assumed that article 19, subparagraph (a) covers all three situations that a more precise analysis can discern:

– Reservation clauses prohibiting all reservations;

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harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effects of the provisions of the Convention in their application to that State". The distinction between the reservations of paragraph 1 and the declarations of paragraph 2 can prove sensitive, but this is a problem of definition that does not in any way restrict the prohibition stated in paragraph 1: if a declaration made under paragraph 2 proves to be a reservation, it is prohibited. The combination of articles 309 and 310 of the 1982 Convention on the Law of the Sea poses the same problems and calls for the same responses (see, in particular, A. Pellet, "Les réserves aux conventions sur le droit de la mer" in *La mer et son droit — Melanges offerts a Laurent Lucchini et Jean-Pierre Quéneudec*, Pedone, Paris, 2003, p. 505 to 517; see also note 87 below).

[67] Example given by P. H. Imbert, op. cit., note 22, p. 166 and 167.

[68] This situation is extremely close to the one in which the treaty specifies the provisions to which reservations are permitted — see para. 39 below and the comments by Briggs (cited above in note 50).

[69] With regard to this provision, P. H. Imbert noted that the influence of the opinion (of the International Court of Justice on the reservations to the Convention on the Prevention and Punishment of the Crime of Genocide adopted two months earlier) is very clear since such a clause effectively protects the provisions which cannot be the object of reservations (op. cit., note 22, p. 167); see the other examples given, ibid., or paras. 39 to 41 below.

[70] See note 46 above.

– Reservation clauses prohibiting reservations to specified provisions;

– Finally, reservation clauses prohibiting certain categories of reservations.

32. While these distinctions could seem self-evident, it is undoubtedly useful to specify them expressly in draft guideline 3.1.1, which could read as follows:

3.1.1. *Reservations expressly prohibited by the treaty*

*A reservation is prohibited by the treaty if it contains a particular provision:*

– *Prohibiting all reservations;*

– *Prohibiting reservations to specified provisions;*

– *Prohibiting certain categories of reservations.*

33. This clarification seems all the more useful in that the third of these situations poses problems (of interpretation)[71] of the same nature as those arising from the criterion of compatibility with the object and purpose of the treaty,[72] which certain clauses actually reproduce expressly.[73] By indicating that these reservations, prohibited without reference to a specific provision of the treaty, still come under article 19, subparagraph (a) of the Vienna Conventions, the Commission could from the outset usefully emphasize the unity of the legal regime applicable to the reservations mentioned in the three subparagraphs of article 19.

**(b) Implicit prohibition of reservations**

34. A cursory reading of article 19 (b) of the Vienna Conventions could suggest that it represents one side of the coin and subparagraph (a) represents the other. However, the symmetry is far from total. To create such symmetry, it would have been necessary to stipulate that reservations other than those expressly provided for in the treaty were prohibited. But that is not the case: subparagraph (b) contains two additional details which prevent oversimplification; the implicit prohibition of certain reservations arising from this provision, which is considerably more complex than it seems, relies on the fulfilment of three conditions:

1. The treaty's reservation clause must permit the formulation of reservations;

2. The reservations permitted must be "specified";

3. It must be specified that "only" those reservations "may be made".[74]

35. The origin of article 19 (b) of the Vienna Conventions can be traced back to paragraph 3 of draft article 37 submitted to the Commission in 1956 by Fitzmaurice:

> "In those cases where the treaty itself permits certain specific reservations, or a class of reservations, to be made, there is a presumption that any other reservations are excluded and cannot be accepted".[75]

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[71] "Whether a reservation is permissible under exceptions (a) or (b) will depend on interpretation of the treaty" (A. Aust, op. cit., note 27, p. 110).

[72] See A/CN.4/558/Add.1, para. 91.

[73] See the examples given above in note 63. That is a particular example of "prohibited categories of reservations" — in a particularly vague way, it is true.

[74] See para. 15 above.

[75] First report, *Yearbook* ... 1956, p. 115; see also para. 95.

Waldock took up that concept again in paragraph (1) (a) of draft article 17, which he proposed in 1962 and which the Commission used in paragraph 1 (c) of draft article 18. That draft article was adopted the same year[76] and, following a number of minor drafting changes, was incorporated into article 16 (b) of the 1966 draft[77] and then into article 19 of the Convention.

36. That course of action did not go unchallenged, however, as during the Vienna Conference a number of amendments were submitted with a view to deleting that provision[78] on the pretext that it was "too rigid"[79] or redundant because it duplicated subparagraph (a),[80] or that it had not been confirmed by practice;[81] all those amendments were, however, withdrawn or rejected.[82]

37. The only change to subparagraph (b) was made by means of a Polish amendment inserting the word "only" after the word "authorizes", which was accepted by the Drafting Committee of the Vienna Conference "in the interest of greater clarity".[83] This innocuous appearance must not obscure the vast practical implications of this amendment, which actually reverses the presumption made by the Commission and, in keeping with the Eastern countries' persistent desire to facilitate as much as possible the formulation of reservations, offers the possibility of doing so even when the negotiators have taken the precaution of expressly

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[76] See paras 23 and 24 above.

[77] See note 53 above.

[78] Amendments by the United States of America and Colombia (A/CONF.39/C.1/L.126 and Add.1) and the Federal Republic of Germany (A/CONF.39/C.1/L.128), which were specifically designed to delete subparagraph (b), and by the Union of Soviet Socialist Republics (see note 28 above), France (A/CONF.39/C.1/L.169), Ceylon (A/CONF.39/C.1/L.139) and Spain (A/CONF.39/C.1/L.147), which proposed major revisions of article 16 (or of articles 16 and 17) that would also have led to the disappearance of that provision (for the text of these amendments, see *Documents of the Conference* (A/CONF.39/11/Add.2), cited above in note 28, p. 144 and 145, paras. 174 to 177). During the Commission's discussion of the draft, certain members had also taken the view that that provision was unnecessary (*Yearbook ... 1965*, vol. I, 797th meeting, 8 June 1965, Yasseen, p. 149, para. 18; Tunkin, *ibid.*, para. 29; but, for a more nuanced position, see *ibid.*, para. 33; or Ruda, para. 70).

[79] According to the representatives of the United States of America and Poland at the Commission's 21st plenary meeting (10 April 1968, *Summary records* (A/CONF.39/11), cited above in note 31, p. 117, para. 8 and p. 128, para. 42); see also the statement made by the representative of the Federal Republic of Germany (*ibid.*, p. 119, para. 23).

[80] Colombia, *ibid.*, p. 123, para. 68.

[81] Sweden, *ibid.*, p. 127, para. 29.

[82] See *Documents of the Conference* (A/CONF.39/11/Add.2), cited above in note 28, p. 148 and 149, paras. 181 to 188. See the explanations of the Special Rapporteur, Sir Humphrey Waldock, *Summary records* (A/CONF.39/11), cited above in note 31, 24th meeting, 16 April 1968, p. 137, para. 6, and the results of the votes on those amendments, *ibid.*, 25th meeting, 16 April 1968, p. 146, paras. 23-25.

[83] A/CONF.39/C.1/L.136; see *Summary records* (A/CONF.39/11), cited above in note 31, Plenary Commission, 70th meeting, 14 May 1968, p. 453, para. 16. Already in 1965, during the Commission's discussion of draft article 18 (b) as reviewed by the Drafting Committee, Castrén proposed inserting "only" after "authorizes" in paragraph (b) (*Yearbook ... 1965*, vol. I, 797th meeting, 8 June 1965, p. 149, para. 14 and 813th meeting, 29 June 1965, p. 264, para. 13; see also the similar proposal made by Yasseen, *ibid.*, para. 11), which, in the end, was not accepted following a further review by the Drafting Committee (see *ibid.*, 816th meeting, p. 308, para. 41).

indicating the provisions in respect of which a reservation is permitted.[84] However, this amendment does not exempt a reservation which is neither expressly permitted nor implicitly prohibited from the requirement to observe the criterion of compatibility with the object and purpose of the treaty.[85]

38. In practice, permissible reservation clauses are similar in nature to those containing prohibitive provisions and they pose the same kind of difficulties with regard to determining *a contrario* those reservations which may not be formulated:[86]

- Some of them authorize reservations to particular provisions, expressly and restrictively listed either affirmatively or negatively;
- Others authorize specified categories of reservations;
- Lastly, others (few in number) authorize reservations in general.

39. Article 12, paragraph 1, of the 1958 Geneva Convention on the Continental Shelf appears to illustrate the first of those categories:

> "1. At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1 to 3 inclusive".[87]

As Sir Ian Sinclair has noted, "Article 12 of the 1958 Convention did not provide for specified reservations, even though it may have specified articles to which reservations might be made"[88] and neither the scope nor the effects of that authorization are self-evident, as demonstrated by the judgment of the International

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[84] See F. Horn, op. cit., note 37, p. 114, Liesbeth Lijnzaad, *Reservations to UN Human Rights Treaties: Ratify and Ruin?*, T. M. C. Asser Institut, Nijhoff, Dordrecht, 1994, p. 39, Jean-Marie Ruda, "Reservations to Treaties", *Recueil du cours de l'Académie de Droit international de la Haye* 1975-III, vol. 146, p. 181 or Renata Szafarz, "Reservations to Multilateral Treaties", *Polish Yearbook of International Law*, 1970, p. 299 and 300. Such restrictive formulas are not unusual — see, for example, article 17 (1) of the Convention on the reduction of statelessness of 1954 ("1. At the time of signature, ratification or accession any State may make a reservation in respect of articles 11, 14 or 15. 2. No other reservations to this Convention shall be admissible") and the other examples given by R. Riquelme Cortado, op. cit., note 27, p. 128 and 129. On the significance of the reversal of the presumption, see also M. Robinson, *Yearbook of the International Law Commission*, 1995, vol. I, 2402nd meeting, *Yearbook of the International Law Commission*, 1995, vol. I, p. 169, para. 17.

[85] See A/CN.4/558/Add.1, paras. 59-70.

[86] See (a) above.

[87] Article 309 of the United Nations Convention on the Law of the Sea provides: "No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention" (on this provision, see A. Pellet, op. cit., note 66, p. 505 to 511). A treaty may set a maximum number of reservations or provisions that can be subject to reservations (see, for example, article 25 of the 1967 European Convention on the Adoption of Children). These provisions may be compared with those authorizing Parties to accept certain obligations or to choose between the provisions of a treaty, which are not reservation clauses *stricto sensu* (see draft guidelines 1.4.6 and 1.4.7 of the Commission and the related commentary in the *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), cited above in note 51, p. 241 to 252).

[88] Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester University Press, 2nd edition, 1984, p. 73. On the distinction between specified and non-specified reservations, see also para. 47 below.

Court of Justice in the *North Sea Continental Shelf* cases[89] and, above all, by the arbitral ruling given in 1977 in the *Mer d'Iroise* case.[90]

40. In that case, the Arbitral Tribunal emphasized that:

> The clear terms of article 12 [of the 1958 Geneva Convention on the Continental Shelf] authorize any Contracting State, in particular the French Republic, to make its consent to be bound by the Convention conditional upon reservations to articles other than articles 1 to 3 inclusive.[91]
>
> However,
>
> Article 12 cannot be understood to compel States to accept in advance any kind of reservation to articles other than articles 1 to 3. Such an interpretation of article 12 would almost give contracting States the freedom to draft their own treaty, which would clearly go beyond the object of this article. Only if the article in question had authorized the formulation of specific reservations could it be understood that parties to the Convention had accepted in advance a specified reservation. But that is not the case here, because article 12 authorizes the formulation of reservations to articles other than articles 1 to 3 in very general terms.[92]

41. The situation is different when the reservation clause defines the categories of permissible reservations. Article 39 of the General Act of Arbitration of 1928 provides an example of this:

> "1. In addition to the power given in the preceding article[93], a Party, in acceding to the present General Act, may make his acceptance conditional upon the reservations exhaustively enumerated in the following paragraph. These reservations must be indicated at the time of accession.
>
> 2. These reservations may be such as to exclude from the procedure described in the present Act:
>
> (a) Disputes arising out of facts prior to the accession either of the Party making the reservation or of any other Party with whom the said party may have a dispute;
>
> (b) Disputes concerning questions which by international law are solely within the domestic jurisdiction of States;
>
> (c) Disputes concerning particular cases or clearly specified subject-matters, such as territorial status, or disputes falling within clearly defined categories".

As the International Court of Justice pointed out in its judgment of 1978 in the *Aegean Sea Continental Shelf* case:

> "When a multilateral treaty thus provides in advance for the making only of particular, designated categories of reservations, there is clearly a high

[89] See judgment of 20 February 1969, *I.C.J. Reports 1969*, p. 38 to 41.

[90] Ruling of 30 June 1977, *Reports of International Arbitral Awards*, vol. XVIII, p. 161 to 165, paras. 39-44.

[91] Ibid., p. 161, para. 39.

[92] Ibid.

[93] Article 38 provides that Parties may accede to only parts of the General Act.

> probability, if not an actual presumption, that reservations made in terms used in the treaty are intended to relate to the corresponding categories in the treaty",

when even States do not "meticulously" follow the "pattern" set out in the reservation clause.[94]

42. Another particularly famous and widely discussed example[95] of a clause authorizing reservations (and which, for its part, falls under the second category mentioned above[96]) is found in article 57 (ex 64) of the European Convention on Human Rights:

> "1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this article.
>
> 2. Any reservation made under this article shall contain a brief statement of the law concerned."

In this instance, the authority to formulate reservations is limited by conditions relating to both form and content; in addition to the usual limitations *ratione temporis*,[97] a reservation to the Convention must:

– Refer to a particular provision of the Convention;

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[94] Judgment of 19 December 1978, *I.C.J. Reports 1978*, p. 28, para. 55.

[95] See Angela Bonifazi, "La disciplina delle riserve alla Convenzione europea dei diritti dell'uomo", in *Les clauses facultatives de la Convention européenne des droits de l'homme* (Minutes of the round table organized in Bari on 17 and 18 December 1973 by the Faculty of Law of the University of Bari), Levante, Bari, 1974, p. 301 to 319; Gérard Cohen-Jonathan, *La Convention européenne des Droits de l'homme*, Economica, Paris, 1989, p. 86 to 93; J. A. Frowein, "Reservations to the European Convention on Human Rights" in *Protecting Human Rights: the European Dimension. Studies in Honour of Gerard J. Wiarda*, C. Heymanns Verlag, Köln, 1988, p. 193 to 200; Pierre-Henri Imbert, "Reservations to the European Convention on Human Rights Before the Strasbourg Commission: The *Temeltasch* Case", *I.C.L.Q.*, 1984, p. 558 to 595; Rolf Kühner, "Vorbehalte und auslegende Erklärungen zur Europäischen Menschenrechtskonvention. Die Problematik des Art. 64 MRK am Beispiel der schweizerischen 'auslegenden Erklärung' zu Art. 6 Abs. 3 lit. e MRK", *ZaöRV*, vol. 42, 1982, p. 58 to 92 (summary in English); S. Marcus-Helmons, "L'article 64 de la Convention de Rome ou les réserves à la Convention européenne des droits de l'homme", *Revue de droit international et de droit comparé*, 1968, p. 7 to 26; Maria Jose Morais Pires, *As reservas a Convenção europeia dos direitos do homen*, Livraria Almedina, Coimbra, Portugal, 1997, 493 pages; Rosario Sapienza, "Sull'ammissibilità di riserve all'accettazione della competenza della Commissione europea dei diritti dell'uomo", *Rivista di Diritto internazionale*, 1987, p. 641 to 653 and William A. Schabas, "Article 64" in E. Decaux, P.-H. Imbert and L. Pettiti dirs., *La Convention européenne des droits de l'homme: commentaire article par article*, Economica, Paris, 1995, p. 923 to 942.

[96] Paragraph 38. For other examples, see A. Aust, op. cit., note 27, p. 109 and 110; S. Spiliopoulou Åkermark, op. cit., note 65, p. 495 and 496; William Bishop, Jr., "Reservations to Treaties", *R.C.A.D.I.* 1996-II, vol. 103, p. 323 and 324 or P. Daillier and A. Pellet, op. cit., note 393, p. 181; see also the table of Council of Europe conventions showing clauses falling into each of the first two categories of permissible reservation clauses mentioned in para. 38 above, in C. R. Riquelme Cortado, op. cit., note 27, p. 125, and the other examples of partial authorizations given by this author, p. 126 to 129.

[97] See note 25, above.

– Be justified by the status of legislation [in the reserving State] at the time that the reservation is formulated;

– Not be "couched in terms that are too vague or broad for it to be possible to determine their exact meaning and scope";[98] and

– Be accompanied by a brief statement explaining "the scope of the Convention provision whose application a State intends to prevent by means of a reservation".[99]

Assessing whether each of these conditions has been met raises problems. However, it can still be considered that the reservations authorized by the Convention are "specified" within the meaning of article 19 (b) of the Vienna Conventions and that only such reservations are valid.

43. It has been noted that this wording is not fundamentally different[100] from that used, for example, in article 26, paragraph 1, of the European Convention on Extradition of 1957:

> "Any Contracting Party may, when signing this Convention or when depositing its instrument of ratification or accession, make a reservation in respect of any provision or provisions of the Convention",

even though the latter could be interpreted as a general authorization. However, while the type of reservations that can be formulated to the European Convention on Human Rights is "specified", here the authorization is restricted only by the exclusion of across-the-board reservations.[101]

44. In fact, a general authorization of reservations[102] itself does not necessarily resolve all the problems. In particular, it leaves unanswered the question of whether the other Parties may still object to reservations[103] and whether these expressly authorized reservations[104] are subject to the test of compatibility with the object and

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[98] European Court of Human Rights, judgement of 29 April 1988, *Belilos, Series A*, vol. 132, p. 25, para. 55.

[99] Report of the European Commission of Human Rights of 5 May 1982, *Temeltasch*, Application No. 9116/80, *European Commission of Human Rights Yearbook*, vol. 25, para. 90.

[100] P.-H. Imbert, op. cit., note 22, p. 186; see also R. Riquelme Cortado, op. cit., note 27, p. 122.

[101] Regarding this concept, see draft guideline 1.1.1 of the Commission's Guide to Practice and the commentary in *Yearbook ... 1999*, vol. II, Part Two, p. 93 to 95.

[102] For another even clearer example, see article 18, paragraph 1, of the European Convention on the Compensation of Victims of Violent Crimes (1983): "Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare that it avails itself of one or more reservations."

[103] This is sometimes expressly stated (see, for example, article VII of the Convention on the Political Rights of Women (1952) and the related comments by R. Riquelme Cortado, op. cit., note 27, p. 121). Article 20, paragraph 1, of the Vienna Convention does not resolve the problem: it allows the reservation to be "established" (or "made") without requiring acceptance, but says nothing about objections. It can, however, be argued that paragraph 4 of the same article seems to exclude the possibility of objecting to a "reservation expressly authorized by a treaty" owing to the fact that paragraph 4 apparently does not apply to cases not falling under paragraph 1.

[104] It cannot be reasonably argued that paragraph (b) could include "implicitly authorized" reservations — other than on the grounds that any reservations that are not prohibited are, a contrario, authorized, subject to the provisions of paragraph (c). In this case, the expression "specified reservation" in article 19, subparagraph (b) is similar to the expression "reservation expressly authorized by a treaty" found in article 20, paragraph 1.

purpose of the treaty.[105] This last point will be discussed under *sub lit.* (c) (see A/CN.4/558/Add.1).

45. At this stage, the only question that arises is whether it is necessary for a particular guideline of the Guide to Practice to specify the scope of article 19, subparagraph (b) of the Vienna Conventions. This could be done in two different ways. One way would be to consider a draft guideline which, where authorized reservations are concerned, would be the equivalent of draft guideline 3.1.1, the text of which is proposed above.[106] However, subparagraph (b) expressly states that the authorization of only "specified reservations" by the treaty (to the exclusion of any other possibility) prohibits the formulation of other reservations. The only option therefore would be to say, *a contrario*, that, if the treaty authorizes the formulation of reservations in a general manner or does not "specify" the reservations that can be formulated in a restricted manner, reservations may still be formulated. Such a draft would merely say the same thing as the existing draft of this paragraph[107] but in a different, "negative" way and would not therefore be particularly useful.

46. On the other hand, it is probably not superfluous to include in the Guide to Practice a draft guideline defining what is meant by "specified reservations". Indeed, such a definition has important consequences for the applicable legal regime, as it can legitimately be argued that reservations which are not "specified" must pass the test of compatibility with the object and purpose of the treaty.

47. Such a definition is not straightforward. It caused particular controversy following the arbitration in the *Mer d'Iroise* case.[108] For some reserving States, a reservation is "specified" if the treaty sets precise limits within which it can be formulated; these criteria then replace (but only in this instance) the criterion of the object and purpose of the means.[109] This position can be based on the arbitral award of 1977, even though that award says more about what a specified reservation is not than what it is.[110] Indeed, the upshot of all this is that the mere fact that a reservation clause authorizes reservations to particular provisions of the treaty is not enough to "specify" these reservations within the meaning of article 19, subparagraph (b).[111] However, the Court confines itself to requiring reservations to be "specific",[112] without indicating what the test of this specificity is to be.

48. It has been noted,[113] however, and not without justification, that it is unrealistic to require the content of authorized reservations to be established with

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[105] See the questions raised by S. Spiliopoulou Åkermark, op. cit., note 65, p. 496 and 497 or R. Riquelme Cortado, op. cit., note 27, p. 124.

[106] Paragraph 32.

[107] Such a guideline should probably be worded as follows: "Paragraph (b) of guideline 3.1 does not exclude the formulation of reservations not expressly provided for by the treaty if the treaty authorizes reservations in a general manner or provides for the freedom to formulate reservations without specifying which reservations can be formulated in a restricted manner."

[108] See note 90, above.

[109] Derek W. Bowett, "Reservations to Non-Restricted Multilateral Treaties", *British Yearbook of International Law*, 1976-1977, p. 71 and 72.

[110] See para. 40, above.

[111] See paras. 39 and 40, above.

[112] In reality, it is the authorization that must apply to specific or specified reservations — terms which the Court considers to be synonymous (see note 90, above).

[113] See in particular: P.-H. Imbert, "La question des réserves dans la décision arbitrale du 30 juin 1977 relative à la délimitation du plateau continental entre la République française et le

precision by the treaty and that this occurs very exceptionally, other than in the rare cases, of "negotiated reservations".[114] In addition, during the Vienna Conference, K. Yasseen, Chairman of the Drafting Committee, included specified reservations among reservations which are expressly authorized by the treaty,[115] with no further clarification. On the other hand, however, the Commission did not retain Mr. Rosenne's proposal that the expression "specified reservations", which he considered "unduly narrow", should be replaced by "reservations to specific provisions".[116]

49. None of these considerations are decisive. However, a compromise must be found between the undoubtedly excessive (because it largely deprives article 19, subparagraph (b) of the Vienna Conventions of any real effect) theory which requires the content of authorized reservations to be precisely stated in the reservation clause and the theory which equates a specified reservation with a reservation expressly authorized by the treaty,[117] even though articles 19, paragraph (b), and 20, paragraph 1, use different expressions. To this end, it must of course be recognized that reservations that are specified within the meaning of guideline 3.1 (b) must, on the one hand, relate to specific provisions and, on the other, fulfil certain conditions specified in the treaty, but without going so far as to require their content to be predetermined. Such a definition could read as follows:

3.1.2 *Definition of specified reservations*

*For the purposes of guideline 3.1, the expression "specified reservations" means reservations that are expressly authorized by the treaty to specific provisions and which meet conditions specified by the treaty.*

## 2. The effect of formulation of a reservation prohibited by a treaty (rejection)

50. It has always been understood that a reservation could not be formulated (let alone "made") where this was expressly or implicitly prohibited by a clause of the treaty. This self-evident truth was stated as long ago as 1950 by Brierly in his first report on the law of treaties; paragraphs (1), (2) and (4) of his proposed draft article 10 on reservations to treaties began with the following formula: "*Unless the contrary is indicated in a treaty* ...".[118] As he explained in the commentary on this provision:

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Royaume-Uni de Grande-Bretagne et d'Irlande du Nord", *Annuaire Français de Droit International*, 1978, p. 50 to 53.

[114] Regarding this concept, see the Commission's fifth report on reservations to treaties, A/CN.4/508/Add.1, paras. 164-171. The main example given by D. Bowett to illustrate his theory relates precisely to a "negotiated reservation" (op. cit., note 109, p. 71).

[115] A/CONF.39/C.1/SR.70, para. 23.

[116] *Yearbook* ... 1965, vol. I, 813th meeting, 29 June 1965, p. 264, para. 7. However, P.-H. Imbert (op. cit., note 113, p. 52) points out, not without reason, that even though Mr. Rosenne's proposal was not accepted, Sir Humphrey Waldock himself had also drawn this parallel (ibid., p. 265, para. 27).

[117] In this connection, see P.-H. Imbert, ibid., p. 53.

[118] The French version A/CN.4/23, cited above in note 22, includes the variants: "*A moins que le contraire n'y soit stipulé* ..." ["Unless the contrary is indicted in ..."] (p. 49), "*A moins que le contraire ne soit stipulé dans le traité* ..." ["Unless the contrary is indicated in the treaty ..."] (p. 51), "*A moins que le contraire ne soit stipulé dans le texte d'un traité*" ["Unless the contrary is indicated in the text of a treaty"] (p. 54), p. 238, 239 and 241.

"[...] in relation to particular treaties, it may have been made clear in advance that the intending parties will not accept any reservation whatsoever. Clauses to this effect in texts of treaties are not uncommon."[119]

51. This logical premise has never been questioned.[120] It simply serves as a reminder that the provisions of the Convention are residuary in nature:[121] "where the treaty itself deals with the question of reservations, the matter is concluded by the terms of the treaty".[122] Where such a clause prohibits the reservation envisaged, the reservation cannot be formulated; conversely, however, where such a clause authorizes the reservation, the question of its validity does not arise.[123] The apparent simplicity of these common sense rules[124] nevertheless obscures delicate problems. Once the problem of the scope of a conventional prohibition on formulating reservations has been resolved, the question arises as to the possible effect of a reservation formulated in spite of the clause expressly (article 19, subparagraph (a)) or implicitly (subparagraph (b)) prohibiting it.

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[119] Ibid., p. 50, para. 88 (English text in *Yearbook ... 1950*, vol. II, p. 239); see also p. 239 and 240, para. 90.

[120] See the first and second reports of Lauterpacht of 1953 (A/CN.4/63, cited above in note 22, p. 136, para. (4)) and 1954 (A/CN.4/87, cited above in note 22, p. 131, para. (1)); the first report of Waldock (A/CN.4/144, cited above in note 23, p. 68, art. 17, para. 1 (a) (i) and p. 74, para. (9)), the explanations he gave during Commission discussions (*Yearbook ... 1962*, vol. I, 653rd meeting, 29 May 1962, p. 157, para. (57)) and the text adopted by the Commission in first reading (ibid., vol. II, p. 176, art. 18, para. 1 (a)) and the related commentary (p. 178 and 179, paras. (10) and (15)); the fourth report of Waldock (A/CN.4/177, cited above in note 20, p. 53, art. 18, para. 2 (a)) and the text adopted by the Commission in 1965 (*Yearbook ... 1965*, vol. II, p. 162, art. 18 (a)) and the related commentary (ibid., vol. II, p. 207, art. 16 (a), para. (17)). Paragraph (a) of draft article 16 caused very few problems during the Vienna Conference; only the amendments proposed by Ceylon (A/CONF.39/C.1/L.147, *Documents of the Conference* (A/CONF.39/11/Add.2) cited above in note 28, p. 134), which were subsequently withdrawn (*Summary records* (A/CONF.39/11), cited above in note 31, 24th meeting, 16 April 1968, p. 127, para. 26), and by the Union of Soviet Socialist Republics, which completely changed draft articles 16 and 17, would have resulted in its deletion (A/CONF.39/C.1/L.115, cited above in note 28); according to the representative of the Soviet Union, this paragraph (like subparagraph (b)) "seemed to be unnecessary, since cases where reservations were prohibited by the treaty were extremely rare. Moreover, retention of the subparagraph would have the effect of laying down a rule which formed an exception, thus restricting the power of States to make reservations." (*Summary records* (A/CONF.39/11), cited above in note 31, Committee of the Whole, 21st meeting, 10 April 1968, p. 107, para. (5)). This amendment was rejected by the Committee of the Whole by 70 votes to 10 with 3 abstentions (ibid., 25th meeting, 16 April 1968, p. 135, para. (23)).

[121] See para. 12 and note 27, above.

[122] *Yearbook ... 1962*, vol. II, p. 178-179, commentary on draft articles 18 to 20, para. (10). Paragraphs (a) and (b) of article 19 "are little more than an acknowledgement that the parties are free to make provision in their treaty whether or to what extent to allow reservations to its terms" (D. W. Greig, op. cit., note 29, p. 51).

[123] See the arbitral award of 30 June 1977 in the *Mer d'Iroise* case, cited above, note 90, p. 161, para. 39: "under article 12 [of the Geneva Convention on the Continental Shelf, cited above, para. 39], the United Kingdom has undertaken not to contest the right, on the part of the French Republic, to be a party to the Convention with the reservations permitted by this article" — however, this does not resolve the earlier question of whether the reservations formulated by France were valid in the first place (see above, para. 39).

[124] To the extent that it has been said that "there is clearly no need for an additional rule in the Vienna Convention" (L. Lijnzaad, op. cit., note 84, p. 39); see also note 45, above.

52. No provision of the Vienna Convention expressly answers this question, of great practical importance, and the *travaux préparatoires* relating to article 19[125] do not shed any light in this regard.[126] This response may have seemed obvious where subparagraphs (a) and (b) are concerned.[127] However, if it is obvious, there is no reason not to transpose it to the situation, generally considered much more uncertain, of subparagraph (c): nothing in the text of the Convention or on the basis of logic justifies different responses.[128] And yet the question of the effects of a reservation that is incompatible with the object and purpose of the treaty (situation of subparagraph (c)) was the subject of long and largely inconclusive discussions during the *travaux préparatoires* on the 1969 Convention. It would therefore seem preferable not to separate the consideration of the effects of a reservation formulated in spite of an express or implicit prohibition within the meaning of article 19, subparagraph (c), from that of the consequences of a reservation that is contrary to the object and purpose of the treaty.

53. Suffice to say at this stage that many commentators believe that a reservation formulated in spite of a conventional prohibition is null and void[129] and consider that its formulation invalidates the expression of consent to be bound.[130] If this is the case, these conclusions should affect the response to the question concerning the effects of a reservation formulated in spite of the provisions of article 19 (c).

[125] See note 53, above.

[126] See D. W. Greig, op. cit., note 29, p. 52 and 53 or A. Fodella, op. cit., note 66, p. 140. See also C. Tomuschat, who believes, however, that the preparatory work demonstrates that in the Commission's view it was impossible to accept a reservation excluded under paragraphs (a) and (b) (op. cit., note 55, p. 477).

[127] For a critical analysis of this pseudo-evidence, see D. W. Greig, op. cit., note 29, p. 52 and 53 and 154.

[128] In this connection, see A. Aust, op. cit., note 27, p. 118 or D. W. Bowett, who believes that this conclusion must be reached a fortiori in the case envisaged in subparagraph (c), op. cit., note 109, p. 83.

[129] See, for example, D. Bowett, op. cit., note 109, p. 84. For a more nuanced analysis, see D. W. Greig, op. cit., note 29, p. 56 and 57.

[130] D. Bowett, op. cit., note 88, p. 84 or Giorgio Gaja, "Unruly Treaty Reservations", *Le droit international à l'heure de sa codification. Etudes en l'honneur de Roberto Ago*, Giuffré, Milan, 1987, vol. I, p. 314. See also C. Tomuschat, op. cit., note 55, p. 467; see the references to Commission's discussions, ibid., note 12; these discussions are less conclusive in this respect than the author would have us believe.